

THE SOCIOLOGY OF A PROFESSION :
THE FACULTY OF ADVOCATES

by

Nan Wilson, M.A. (Edin.)



Presented in fulfilment of the requirements for the
Degree of Doctor of Philosophy
at the
University of Edinburgh

1965

C O N T E N T S

	<u>Page</u>
<u>Part I</u>	
Chapter 1 General Introduction	1
Chapter 2 Comparative Sketch of Legal Professions	12
Chapter 3 The Evolution of the Faculty of Advocates: Its Social and Professional Setting	62
Chapter 4 The Faculty of Advocates Today	90
<u>Part II</u>	
Chapter 5 Introduction to Analysis and Interpretation	122
Chapter 6 The Status and Role of Advocate	149
Chapter 7 The Professional life Cycle of the Advocate	173
Chapter 8 The Advocate's Role Set	191
Chapter 9 Role Preservation	226
Chapter 10 Conclusion	246
Appendix A The Scottish Courts	258
Appendix B The Scottish Bench and Bar in 1890	268
Appendix C An Excursus on Society, Law and Morality	270
Bibliography	285

PART 1

Chapter 1

GENERAL INTRODUCTION

The inferences of value which a social anthropologist may draw from a study of the Faculty of Advocates will be discussed in detail after its history, structure, function and organisation have been described. First, however, it seems desirable to touch on a number of general considerations in an attempt to present the whole subject in perspective.

Riesman in his paper "Towards an Anthropological study of Law and the Legal Profession"¹ has already stressed the need for serious sociological investigation of the structure of law, the type of people it attracts, their training and the role the law has played in shaping present day society. He writes in particular of American law and lawyers, and, though his general comments are relevant for a study of all Western systems, it is clear that his illustrations and examples based on observations of law and lawyers in the United States would not necessarily be useful or accurate if applied to other western legal systems. Within the legal profession in all such systems the division of roles varies greatly, and this in part accounts for the two contradictory public images of the lawyer which have persisted over the centuries. On the one hand, a lawyer may appear as an heroic figure: on the other he is envisaged as mean, avaricious, unscrupulous, a manipulator of technicalities. It is perhaps significant that in Riesman's own country the expression "Philadelphia Lawyer", which meant originally a fearless champion of accused who, through political pressures, might otherwise have

1. (1951) LXXVII Am. J. Soc. 121.

been denied counsel and then came to mean a specialist who was 'too clever by half', has come now to imply in effect a pettifogging attorney. It may be suggested that through separation of roles one part of the legal profession may command and retain public respect, while other groups such as the "shyster" lawyer, are scapegoats for all public disapprobation of the law's failure to secure justice between man and man or citizen and state. An English County Court Judge of great experience (His Honour Judge Henry Cecil Leon, Q.C., who writes under the literary pseudonym of "Henry Cecil") has stressed that 'a man who is in the right hardly ever gets everything to which he is entitled' due to delay, inconvenience, uncertainty and expense. He proves this, and says there is general, if not unavoidable dissatisfaction experienced by those who resort to the law.² This colours the image of the legal profession.

To generalize, there are perhaps five roles which are fulfilled by lawyers in western legal systems - the jurist, the judge, the advocate, the solicitor and the notary. The prestige attaching to each role varies from system to system, and may vary as specialisation of the function crystallises. The status of advocate may differ according as to whether the legal system is dominated by Judges or Jurists. Riesman notes³ that in America "The judge stands the image of the lawyer hero". He adds that the higher the court the greater esteem the judges evoke, yet the corporation or industrial lawyer, the Wall-Street lawyer, the Washington lawyer, influencing great policy decisions are in fact more significant than the judge and can do most of their

2. Not Such an Ass. p.13.

3. op.cit., p.122.

work outside the courts. Similarly, in England and in countries whose legal systems have been influenced by English lawyers, the judge is of all lawyers the one who commands the greatest respect. This is not of course true of western systems which organise their systems in the Romanistic tradition where the Jurist is pre-eminent. In such systems the judiciary or magistrature is a career embarked on at the stage of professional qualification, not by way of promotion after proven success at the Bar. In Germany, the professor or academic lawyer takes precedence over the judge.

Such a situation would not surprise an anthropologist who had traced the course of the evolution of German law and legal procedure back to Roman sources. The headwaters of Roman law flow from a juristic not a judicial aristocracy. Sir Henry Maine, one of the few legal writers to have shown sympathy with and understanding of the aims of social anthropologists, has commented upon ancient law in the West as follows:-⁴ "The important point for the jurist is that these aristocracies were universally the depositaries and administrators of law..... the epoch of customary law and its custody by a privileged order is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe or a sacerdotal college is true unwritten law."⁵ The unwritten law was not, as in England, in gremio iudicum, but a mystery declared by jurists. Talcott Parsons in his important paper The Professions and Social Structure⁶ noted "Comparative

4. Ancient Law (10th Ed.) pp. 10-11.

5. Ibid. pp.10-11.

6. (1939) 17 Social Forces 457; Essays in Sociological Theory, p.34.

study of the social structures of the most important civilisations shows that the professions occupy the position which is ... unique in history. Perhaps the closest parallel is the society of the Roman Empire where notably the law was very highly developed as a profession indeed." Certainly a close study of the legal profession in Rome would provide ample confirmation of that paper's conclusion that the elements of rationality although blended with strong elements of traditionalism, specificity of function and of universalism are of cardinal importance in an evaluation of the rôle of a profession. Rome's earliest laws were never expressly repealed up to Justinian's day, yet they had been interpreted out of all recognition by juristic adaptation to social needs.

Originally the function of declaring or interpreting the law of Rome was entrusted to the Pontiffs, an aristocratic college which was in no sense concerned with spiritual matters. The situation was well put by Schulz⁷ "The earliest Roman jurist known to us is the state priest (sacerdotes publici). It is necessary from the outset to be clear as to the religious and sociological character of the four priestly colleges. Priests they were, but the great variety of meanings borne by the term 'priest' has been overlooked by legal historians. In the present case the spiritual and charismatic elements of the priesthood are very much in the background. These priests were not spiritual persons, but men of high social standing whose economic position enabled them to undertake public duties without pecuniary reward. The door to their illustrious guilds was opened partly by high birth and partly by meritorious service to the state in peace or war."

7. F. Schulz, Roman Legal Science, pp. 6-7.

Eventually the place of the pontiffs was taken over in Rome by lay jurists who, by their interpretation of the law, by their teaching and writing, and by advice to the magistrates and judges, played a vital rôle in the formulation of Roman law. These jurists were at first almost invariably aristocrats. They accepted no remuneration for their services; their reputation and authority were pre-eminent. The Roman jurist of the classical period had his reward in the respect which he commanded. He did not appear to plead as advocate. Advocates (oratores) were in the main ignorant of the law, and, though some like Cicero enhanced the prestige of the profession in general, the social status of most advocates was inferior. Those of humble origin might by way of the advocate's toga gain social advancement. It was against such men that satirists wrote bitterly, accusing them of lack of scruple, avarice and other vices,⁸ again the double image of lawyers.

Only at a much later period when advocates were required to qualify in law and join an organized profession did their position carry any high prestige. The succession of great jurists came to an end in the Third Century and Byzantine bureaucracy eventually controlled all aspects of the legal profession - judiciary, teachers, law-makers, notaries and pleaders.

The leading treatise on the origins and social position of the Roman jurist is, of course, W. Kunkel's Herkunft und soziale Stellung der Römischen Juristen, but Schulz's Roman Legal Science traces the development of the legal profession generally in Roman society with particular awareness of the social factors.⁹ The jurists of Republican times were of noble family and their successors were in general from good families. Throughout the Classical Period (1st - 3rd Centuries A.D.) the legal profession in Rome, however,

8. See Friedländer-Wissowa Sittengeschichte i, p.182 et seq.

9. See in particular pp. 6-7, 41-43, 102-104, 268-272.

included those who were then regarded as of the lower orders, advocati or forensic orators, and tabelliones (notaries), and those who gave elementary instruction in the law. In the Eastern Empire, where Roman law reached its culmination under Justinian, there was a certain change in the prestige of rôles. The advocate's role took precedence of that of the contemporary - though not of the classical-jurist, whose repute was reflected by the esteem of the Doctors of the Reception (Twelfth Century). Schulz observed¹⁰ "Once again, for the last time in the history of the ancient world, Roman law was still showing its power of attraction. As of old under the Republic and still under the Principate it was precisely the educated and well-to-do classes who in the Eastern Empire turned to jurisprudence with the object of becoming advocates or higher officials.... The social origins of the men of law as a group were much the same as under the Principate. Plebeians still made their way under cover of the toga, but large numbers of young men of respectable family entered the profession. Advocates were held in high respect. " Exclusion from political activity attracted both Roman and Byzantine talent and social position to the professions of Law and Arms. This pattern is reflected in Scottish life after the Union of 1707.

Justinian, who regarded his codification of Roman law in the Corpus Iuris Civilis (528-534) as final, still described the role of the lawyer as similar to that of the priest - "Cuius mento quis nos sacerdotes appellet."¹¹ The Digest is a collection of edited fragments from the opinions of great Roman jurists, successors to the veneration accorded to the early pontiffs and mediators of that respect to the Civilian i.e. Romanistic jurists who have taught or written up to the present time. Jurisprudence, Justinian

10. pp. 269-271.

11. Dig. I, 1.1.1.

defined¹² as the knowledge of things divine and human, the science of the just and unjust. The opinions of the Roman jurists continued to dominate European legal thinking directly until the era of codification was introduced by Napoleon. The main European codifications are still erected upon foundations of Roman law. To this day, while in the Anglo-American world the majesty of the law is symbolised by the judge, in countries which have inherited a Romanistic tradition - as in France, Germany and Italy - to the lawyers themselves at least the jurist is the figure most regarded, and here may be mentioned a matter to which repeated attention will be paid in later chapters - the public image of the law and lawyers, and the image which lawyers have of law and themselves, which do not always or necessarily coincide. It would be difficult for an intelligent or even an unintelligent layman or laywoman to take seriously Sir Frederick Pollock's vision of the English Common Law in 1912. He described¹³ "Our Lady of the Common Law" as belonging "to the kindred of Homer's Gods, more powerful than men; not passionless or infallible, she can be jealous with Hera, ruthless with Artemis, and astute with Athene. We are her men of life and limb and earthly worship." The sceptic might observe that outside England none has been voluntarily converted to her worship. A less hieratic assessment of the Anglo-American common law is that of O. Wendell Holmes, "The life of the law has not been logic; it has been experience."¹⁴

The social anthropologist will note the recurrence of the religious motif in both the great legal traditions of the western world, namely, the Civil or Romanistic law and the Anglo-American Common law. Ceremonial

12. Inst. I, 1.

13. The Genius of the Common Law p.2

14. Holmes: The Common Law p.1.

invocations of the deity and religious symbolism are more apparent in the western judicial process than in any other profession or public function, whether it be by the hanging of a crucifix in court, as on the continent of Europe, or by holding religious services at the beginning of the legal year, or by prayers offered at the opening of Circuit or Assize, or until recently in England by the solemn and somewhat obscene request for divine mercy upon a convicted accused who has just heard sentence of death pronounced. Parenthetically, one may also observe that if the public administration of justice in the western world is fortified by rites of the Church, the theology of the Western church itself has been deeply penetrated by legal concepts through the Fathers of the church - Augustine, Ambrose and Tertullian in particular. Through Aquinas and Calvin the Western churches think and speak largely in terms of justification, guilt, judgment, punishment, atonement, and remission of sentence. Through the Chancellor's function as Keeper of the Conscience of the English Kings, developed the strange parallel system of Equity to supplement the rigors of the English Common Law. Yet, despite the stress put upon mercy and good conscience by the early Chancellors, Equity proved so vulnerable to the legalistic attitude of the English legal profession that it degenerated into the horrors portrayed by Dickens in Bleak House or by Galsworthy in In Chancery. While the lawyers turned their 'mystery' into quasi-religion, the ecclesiastics turned their mystery into quasi-law.¹⁵ The interaction between law and traditional Christian morality is more fully considered in Appendix C to this thesis.

As has been suggested already, the legal profession over the centuries in the various countries of the West has presented a double image - one of

15. Denning "The Need for a new Equity" in (1952) Current Legal Problems p.1.

respect and the other of revulsion. In Scotland, as will be discussed later, the Faculty of Advocates segregating its rôle by stages over a long period of time, created a favourable popular image. This, it is suggested, has been in part due to the smallness of the group concerned and in part due to somewhat complex historical factors. Moreover, there are indications that the high-water mark may already have been reached and that the flood-tide may already be receding. The Faculty of Advocates, as will appear, were recruited in the main from the most privileged sections of the community. They were almost exclusively Scotsmen and the nature of their work concentrated them both at home and in the courts in the capital of Scotland itself, from which since the Unions of 1603 and 1707 London had drained the leaders of other important social groups. The Faculty has offered many services gratuitously, in particular in its defence of poor persons accused of crime, and the public imagination conceives erroneously that criminal law is the main function of an advocate. The War of 1939-1945 has clearly shaken the economic and social foundations on which the whole of the Faculty was based. The Legal Aid (Scotland) Act, 1949, and the Criminal Justice (Scotland) Act, 1963, now provide for State legal aid to persons of moderate means, thus remunerating advocates for work which formerly they would have undertaken out of a sense of public duty. It will be considered later whether this elimination of gratuitous services reduces their status. Those who can afford to work for nothing and out of public duty enjoy a very high esteem, as was true of the Roman jurists. To offer services gratuitously or to be very highly remunerated alike augment status. Working for a modest competence does not. Legal aid for criminal work under statutory authority only became operative on 19th October, 1964. In 1960 a Committee presided over by Lord Guthrie observed¹⁶ "The day in which the doctor and the lawyer

16. *Comm.* 1015/1960.

were the rich men of the community, and could afford to spend a fair proportion of their time on unremunerative work of a charitable nature is over." Though Britain has not yet entered the Common Market many lawyers assume that in time she will. Should this be so the repercussions on the organisation of the legal profession in Britain could be considerable. One of the objects of the Common Market is¹⁷ to secure freedom of movement and of employment for the nationals of any one member state in the territory of another and its programme envisages that by 1970 any citizen of a Common Market country will be able to exercise a profession on the same terms as nationals of any other associated country. This means that the laws of each state must be prepared to admit nationals of other states to practise in its courts. In general, the organisation of the legal profession in the present six Common Market states does not recognize the division between advocates or barristers on the one hand and solicitors on the other. Thus it is at least possible that the segregation of role which has characterised the Faculty of Advocates in the past may in the future be modified in various ways. Another factor which casts a shadow over the Parliament House is the increasing diversion of specialist work to England through nationalisation or economic concentration directed from the South. The desirability at this moment in time of undertaking study of the role of the Faculty of Advocates in the mid-twentieth century is self-evident. The opportunity for field work on, as opposed to historical study of, the Faculty and its roles of greatest interest to the anthropologist may in future be limited.

For the sake of perspective and to stress the unique organization of

17. See E.H. Scammel, *The Common Market and the Legal Profession*, (1963) Current Legal Problems, 54 at p.64.

the Faculty, however, it seems desirable to conclude these introductory comments with a few elementary comparative observations on the organization of the legal professions in other western countries. As has been noted the legal systems of these countries are divided broadly into those which are Civilian or Romanistic and those which are founded on Anglo-American Common law. Scotland, like Quebec, Louisiana and South Africa has drawn upon both legal traditions so far as content of law is concerned.¹⁸ It must be observed, however, that a social anthropologist studying the organization of a legal profession and the segregation of rôles in particular cannot generalize safely to any great extent along the lines of the division between Civil law and Anglo-American law. Divergence in formal rules between Civilian and Common Law may not (as Riesman suggests they do) imply fundamental differences in attitude. One safe generalization which may be made is that in the former category of systems the rôle of the jurist as teacher and writer is especially respected, while in the latter the judge, rightly or wrongly, is the hero-image. Neither jurist nor judge is of direct interest in this study except as orienting the development of specific legal systems and for relative comparison with the Bar, since it is in the field of legal practice that the Faculty of Advocates must be evaluated.

Since, as Riesman has stressed,¹⁹ legal education has an important effect upon the lawyer's outlook on society and upon his own profession some attention must be paid to requirements imposed for qualification to practise.

18. See T.B. Smith: Studies Critical and Comparative, Introduction passim.

19. Op. cit. supra, n.1.

Chapter 2COMPARATIVE SKETCH OF LEGAL PROFESSIONS

Before proceeding to trace the evolution of the Faculty of Advocates over the centuries, the material for which is based on secondary sources, and before describing its present role, the material for which has been collected by field work, it seems appropriate to include a comparative sketch of the organization and functions of the legal profession in certain other countries. Scots law combines the European civilian tradition with certain Anglo-American elements, and for this reason it has been decided to select for consideration the legal profession in two Continental systems, France and Germany, and then those of England and the United States. Whereas the description of function in the cases of France, Germany and England is based mainly on literary sources, checked with lawyers experienced in actual practice in the system described, the account of the American legal profession derives largely from field work. The writer had the privilege of working as a 'Special Student' at Harvard Law School, the leading Law School of the United States, and she also received generous grants from the Louisiana State Law Institute and from Edinburgh University to conduct research into the role of the legal profession in America. She had the opportunity to attend at Harvard Professor Braucher's course on the legal profession and Professor Caver's course on legal education. She was also enabled to meet and talk with many lawyers of many kinds and in several states and also to visit courts ranging from the Supreme Court of the United States at the invitation of Justice Brennan, to courts of minor jurisdiction.

FRANCE¹

The patron saint of lawyers in France is St. Ives (1253-1303) whose Feast is observed to this day on the 19th May as a legal holiday. As advocate and judge he was celebrated for his rectitude, wisdom, and concern for the widow and orphan. Of him it was said "Advocatus et non latro res miranda populo" (Advocate yet not a thief, a wonder to all) which again pinpoints the double image which the lawyer presents to the public.

Apart from the Cour de Cassation in Paris which has its own specialist Bar and is concerned only with errors of law, the administration of justice in France is substantially de-centralised. The Courts of first instance - Tribunaux Civils have limited territorial jurisdiction, but almost universal jurisdiction over litigated matters. A rough approximation would be in Scotland the situation which would result if the Outer House of the Court of Session were to be eliminated (and its present importance is, of course, a nineteenth century development) and the Sheriff Courts to have general original jurisdiction over actions.²

As will appear in the following chapter tracing the development of the profession of Advocate in Scotland, French influence was important at the outset. For example, the Faculty of Advocates as a constituent element of the College of Justice with the Dean as its elected head may well have originated as the result of French influence. Smith has asserted in Studies Critical and Comparative³ that through the influence of Bishop Elphinstone, who had studied in France, the Parlement of Paris was taken as a model for the Court of Session when it was established as the College of Justice. The French system has thus special comparative interest for the present study; both historical and contemporary

1. See generally Crémieu Traité de la Profession d'Avocat, David & de Vries The French Legal System Chapter 1-3; Schlesinger Comparative Law (2nd Ed.) 73 et seq. 203-207; Olivier Martin Histoire du Droit Français p.322 et seq;
 2. See A.E. Anton, Scottish Thoughts on French Civil Procedure, (1956) Jur.Rev. 158-9.
 3. p37 et seq.

factors are important. In pre-Revolution France royal justice was administered in various Parlements and was not centralised. The judges - Messieurs de Parlements - domini curiae - enjoyed very high social status, and though only of the noblesse de la robe, their dignity was transmissible as was their office. In each Parlement as well as judges, royal officials, greffiers and huissiers (corresponding to clerks or macers) there were avocats and procureurs. These were organised in distinct corporations, each with its bâtonnier or head with its own disciplinary machinery. They were strictly controlled by the Court before which they practiced and before which they renewed each year their professional oath.

The Court conferred a considerable honour when it requested the King to attach an advocate to that tribunal, and the office itself carried great prestige. The advocate was a member of an order, a Chevalier ès Loi. The ranks of the order were, naturally enough, recruited from the privileged classes and had corresponding public obligations and responsibilities. These practitioners in most cases did not hold university degrees, because not until 1679 were courses given in French dealing with French legislation and customs. Universities taught only Canon and Civil Law, while professional training was through the medium of apprenticeship to members of the Ordre des Avocats. Professor John P. Dawson of Harvard is at present writing the History of Professional Judges which will complement his History of Lay Judges. In the work being prepared he deals fully and critically with the organisation and function of the Parlements which were destined to be swept away at the Revolution. In the modern system, it will be observed, the judges of France have become public officials without the exalted status of their predecessors, but the avocat still retains high prestige, and in general the profession of advocate is not calculated to attract young men of modest means.

The French legal profession is very highly specialised. Preparation for its various branches is thorough, and a University degree is followed by a stage - apprenticeship - and competitive examination. Legal education is part of the nationally uniform system of free secular public education, but to be admitted a candidate must have passed the Baccalaureat which comprises a considerable range of scholarly knowledge - philosophy, literature, languages, natural science and mathematics, and the student must effect a synthesis of his knowledge - not merely pass courses. Similarly, as for admission to the Faculty of Advocates in Scotland, a liberal general education is required as well as legal qualification. The Licence en Droit, a four year curriculum at a French university caters for the needs of those who have no intention of entering the legal profession and is therefore wide in its scope, yet in content more or less uniform throughout France. Accordingly, the French lawyer is conditioned by his studies at the Ecole de Droit to approach the law in a scholarly way, as a social science and also as an intellectually stimulating and satisfying body of learning. The status of the law professors in France is high and their opinions and writings (doctrine) are treated with great respect by the courts. Indeed, the fact that their writings are abstracted from actual controversy gives them greater - not as in Scotland and England less - weight. The teaching methods adopted in France also tend to buttress the law teachers' authority. Emphasis is on systematic oral presentation, and though latterly students have been required to research into particular problems, the American 'Case-book' method is altogether inconsistent with French tradition. As has been said⁴ by a distinguished French scholar, Professor René David, who also was a disciple of Gutteridge of Cambridge, 'The law schools of French universities other than

4. David & de Vries The French Legal System, p.26.

the University of Paris, which has a huge student body, do afford an opportunity for contact between a professor and his students, but French students generally speaking are not inclined to raise questions and they reveal the extent of the authority exercised over them during their entire schooling by their restraint in taking any position which might be regarded as critical or disrespectful of the professor. He in turn finds it difficult to close the gap without yielding some of the authority which in France has been necessary to his effectiveness as teacher'. The overall effect of university law teaching of this kind on the legal profession is to make it approach practical problems from a general and philosophical standpoint. The law professors' influence on the legal development is very considerable.

After obtaining his or her licence, since women take a prominent part as avocats in France especially in Paris, a candidate for any branch of the legal profession must accomplish a stage and further examination. In France general practice of the law is not restricted to persons who have received formal legal training, and legal work is often done by individuals or firms describing themselves as agents d'affaires, but for many legal matters a professional is required by law or expediency. The main branches of the profession are as follows:-

(a) The Judiciary:⁵ Professional judges are, in effect, members of a judicial civil service. It is, however, competent for law professors or avocats to be appointed judges and eminent professors sit in the highest courts. Over three hundred women hold judicial appointments in France - some as Presidents of Courts. Promotion within the service is a general rule. The candidate for this service

5. The magistrature in France, is either assise - i.e., the judges - or débout - i.e., officers of the executive or the Ministère Publique, who are appointed and classified as judges. The judiciary also comprises certain lay judges who sit in specialised tribunals.

after his licence takes a period of practical training followed by an examination to qualify either as a juge de paix or judge of general jurisdiction. Those qualified in this latter category may gain promotion from the lowest to the highest judicial office in the Republic - Premier Président de la Cour de Cassation.

By contrast with the Scottish and Anglo-American systems in which promotion to the bench crowns success at the Bar - and consequently relations between bar and bench become close - in France a barrier between the two exists, based on difference of temperament, training and outlook. Bench and Bar have their own separate traditions and regard each other, not as brethren, but as belonging in effect to different professions. The judiciary who seldom sit alone have developed their own esprit de corps rooted in tradition. This contrasts with the more personal professional public image of the individual judge in Scottish and Anglo-American systems. Judgments are delivered by the court and not by individuals and dissenting judgments cannot be given. Unlike the old Messieurs de Parlement modern French judges are not primarily and deliberately law makers. Appointment to the judicial branch of the legal profession (whose members are often chosen through family tradition) guarantees security and reasonable tranquility. To it attaches neither the prestige of the old regime nor that of the judge in the Anglo-American system. The relatively small salaries paid to the lower judiciary seems at present to discourage recruitment. The judiciary tends to compensate for its own rather undistinguished public image by regarding the avocat as something comparable to the Roman orator.

A judicial civil service, as in France, is a system intended to eliminate political pressures and to maintain impartiality. Promotion may of course be influenced by personal relations and impressions made upon superiors in the hierarchy - and therefore conformity with the views of higher courts is encouraged.

Nevertheless, the civil service mentality minimises the personal factor in matters of promotion. This system, it will be noted, contrasts strikingly with that of Scotland where promotion to the Bench depends on a reasonably successful career at the Bar and where political factors often are important, especially for the filling of the highest judicial offices.

(b) Ministère Publique: The office of Ministère Publique dates from the Fourteenth century when the King of France authorised certain persons to represent his views in matters of public or general interest - to some extent acting like the Lord Advocate or his representatives in Scotland for Her Majesty's interest. Representatives of the Ministère Publique or 'parquet' belong to the magistrature debout. They, like the judges, are appointed and classified as magistrats. They may often be appointed to the judiciary having indeed taken the same qualifications, and their arguments carry special weight with the courts. As David and de Vries⁶ have noted - 'Undoubtedly the weaker role of the court as compared to its counterpart in Anglo-American countries is to some extent buttressed by institution of the Ministère Publique.'

(c) Avocats. In prestige the avocat ranks with the law professor and higher ranks of the judiciary. The French Bar has preserved its ancient organisation in its Orders (Barreaux) membership of which is necessary for practice. Through its elected head the Bâtonnier (comparable to the Dean of Faculty in Scotland) and its executive council (Conseil de l'Ordre - comparable to the Dean's Council) the Barreau of each city or district exercises disciplinary powers over its members. Before admission an avocat must gain a certificat d'aptitude conferred by a faculty of law, the courses for which are given mainly

6. op.cit. p.21.

by advocates, civil servants, judges and avoués. These courses are designed to instil the essential professional knowledge and traditions. The certificat requires an examination which by force of circumstances becomes competitive. The Barreau de Paris, for example, can admit only 250 to 300 stagiaires each year, yet 700 may present themselves as candidates. The examiners are headed by the Bâtonnier of the Paris Bar and the Dean of the Paris Law Faculty. After obtaining his certificat the successful candidate makes application to the Bâtonnier of the Bar where he wishes to be admitted. Three persons are permitted to join together in practice in Paris, but in general the avocat practices on his own. The large firms encountered in Germany and the United States are unknown in France, where most avocats practice as in Scotland in their own residences. Except for a few celebrated defenders in criminal cases, specialisation in a particular field of law is unusual. Though the courts exercise authority over those who speak for them, the primary responsibility for the avocat is to the Ordre des Avocats, the particular local guild to which he belongs. The avocat combines most of the roles of advocate and solicitor. His main function is to some extent comparable with the orator, in the Roman system since he specialises in oral argument. Unlike the orator, however, he has mastered the law. Though French procedure precludes the dramatic elements of cross examination, the avocat is given considerable oratorical licence in his address to the court.

The French advocate identifies himself much more closely with his client than does the Scottish advocate, due perhaps to the fact that parties in France are the personal clients of advocates and partly because the object of oral pleading is to convince the court that the written evidence is valid. It may be noted that the division of function between avocat and avoué does not correspond exactly to the division between advocate and solicitor in Scotland, either

geographically or according to functions actually performed.⁷ Senior members of the Bar are not required by virtue of their office to give their services gratuitously by way of legal aid. This duty is imposed on junior members of the Bar. In civil causes this means acting for no remuneration whatsoever, but in criminal causes, if the Bâtonnier, having allocated the services of an avocat finds the accused has sufficient means to pay he may transform the official appointment into a remunerated service.

Cases argued before the Cour de Cassation (or Conseil d'Etat) and criminal trials require the services of the avocat and he is of course engaged before other tribunals. The avocat does not, however, enter into a contract with his client any more than in Scotland. The tradition moreover was that the profession would suffer loss of prestige if members depended on professional activity for a livelihood, though they were free to accept a voluntary and spontaneous honorarium from a client. In 1885 the Bâtonnier of the Paris Bar declared⁸ "The avocat does not discuss any money questions with his client. He requests nothing from him either before or during a case." In modern times it has become recognised by the Courts that an avocat has a right to compensation - but in general an avocat acts unethically and is liable to disciplinary action if he sues for his fee. Gratuitous service enhances the prestige of the profession. Some Bars however permit an avocat to sue if he first obtains leave of the Bâtonnier or Conseil.⁹ This attitude to remuneration is of course reflected in Scottish legal etiquette which forbids an advocate from suing for a fee. Since the Second World War lack of expectation of reward comparable with that offered in

7. Poinaret 'The Study of Law, the Stage and the Profession of Advocate' (1948) Rev. du Barreau de Québec 113 *passim*.

8. Quoted by Lepaulle 'Law Practice in France (1950) 50 Colum. L.R. at pp.949-50.

9. Cremieu Traité de la Profession d'Avocat (2nd Ed 1954) p.247 et seq.

other occupations has tended to discourage recruitment of men as avocats - but the profession as in Belgium, Germany and especially Italy has become increasingly attractive to women. Of rather over 2,000 avocats in Paris 700 are women. Since the war some decline in the status of avocats has been suggested, yet the more favourable popular image is of high status and any avocat taking other employment must resign from the Bar. The costume of the avocats portrayed by Daumier in Les Gens de Justice has now been modified. Toques are no longer worn, but the traditional boxes which contained them are kept in the robing rooms and are used as receptacles for papers left for their owners by colleagues. Specialised in rôle, vested with those social attributes discussed by Talcott Parsons, the avocat is accorded high respect. Whatever his seniority he is addressed as "Maître" - Gallic delicacy accords the same designation irrespective of sex. In concluding this sketch of the avocat it may be noted that avocats who appear before the Cour de Cassation or the Conseil d'Etat fulfil a special rôle. These are officiers ministérielle. They buy their office and discharge both the functions of avocats and avoués as Scottish advocates seem to have done in the Seventeenth and early Eighteenth centuries. They do not appear before other courts and their number is limited to sixty. This small professional group has thus even higher social density and more 'exclusiveness' than the Faculty of Advocates.

(d) Avoués correspond roughly speaking to solicitors engaged in civil practice. They are officers of the court, are limited in number, and either inherit or buy their practices. Their services are necessary in litigation, and unlike the avocats they enter into contracts with their clients. Contrasting with the avocats the avoués undertake much of the writing necessary in litigation and superintend the carrying out of the courts' judgments.

They may not instruct or be instructed by avocats, who on the whole tend to minimise the importance of their function. Nevertheless their office is both ancient and honourable. Henry IV, being in need of money, created their offices and instituted the system of selling them. Today there are no more than at the time of creation - 150 practising in the lower courts in Paris and 52 in the Paris Court of Appeal. There are, perhaps, three or four vacancies by death or resignation each year and the aspirant to office who has to satisfy the scrutiny of the Compagnie des Avoués must wait much longer than the avocat for admission to full status.¹⁰ There is a current project to abolish by legislation the profession of avoué as an anachronism, to compensate those who follow it, and to permit them to become avocats. In the Cour de Cassation and Conseil d'Etat, as has been noted, sixty privileged practitioners discharge the functions both of avocats and avoués. In practice proceedings are mainly in writing before these tribunals as in Scotland until the early Nineteenth Century.

(e) Notaires. The office of notaire is very important in France as in most countries deriving their tradition from the Civil Law. In Scotland, though not in older times, in England and America the function of the notary has become largely formal. The French notaire has almost a monopoly of such matters as conveyancing, matrimonial settlements and succession. He is empowered by law to impart the quality of acte authentique to certain formal legal writings. Again, quoting David and de Vries¹¹ "As family counsellor and thus often the informal arbiter of disputes, he is especially in the smaller towns a solidly established eminently respectable institution."

10. cf. Scotland. Many solicitors feel they could do advocates' work.

11. p.24.

GERMANY

Having selected the organisation of the French legal profession as most relevant for comparison with that of Scotland, the profession in Germany will be considered very briefly - mainly for purposes of comparison with the French. As will appear there are fewer similarities to and more contrasts with the Scottish system. Dr. Erich Döhring in his Geschichte der Deutschen Rechtspflege seit 1509 and Professor Dawson whose typescript the present writer was privileged to read at Harvard have surveyed the history of the German legal profession in detail. Indeed, Dr. Döhring's book provides a starting point for future close historical anthropological investigation. No detail historically treated is too small for his attention. The development of the social position of judges; admission of advocates to practice; the eventual abandonment, as in Italy, of the division of the legal profession into two main sections, the use of oral and written argument are all explained. Even the paintings which ornament the courtroom, the seating arrangements for counsel and the quality and quantity of food which the travelling lawyer might expect his client to provide for him are described. Unfortunately this study stops abruptly with the arrival of Hitler in 1933.

Though the function of the notary tends to be set apart from other professional activities, in German speaking countries, by contrast with the situation in France, the functions of advocate and solicitor are merged in the Rechtsanwalt. Legal firms in Germany, as in the United States and indeed as in Italy which in other respects has been strongly influenced by the French system, may comprise numerous partners who not only specialise in a particular branch of the law, but engage both in chamber and court practice.

In Germany (the Federal Republic alone will be considered) those who take a course in legal education fall into several categories, namely - legal scholars, jurists, judges, prosecutors, officials, counsel, notaries and advisors to industrial or commercial enterprises. The basic training is the same for all. A candidate for legal education must have taken the state Abiturientien examen which required a high standard of education - much higher indeed than the minimum required for a university or college degree in Arts at many British or American universities. Entering University at the age of 18 or 19, the German law student undertakes three years of legal studies, studies which are often pursued at a number of different universities. Though as in France in recent times more active participation has been required of students, instruction is given by expository lecture. At the end of three years a student undergoes examination - extending over four months - and if successful becomes a Referendar. At this stage specialisation of professional training begins. The most revered of lawyers are the jurists, those who teach and write. After qualifying as Referendar the aspirant to juristic eminence must gain the degree of Doctor awarded for an original contribution to legal scholarship. Thereafter he will normally spend three years preparing a further thesis to justify his admission to the teaching faculty of a university, as Dozent - instructor. Thereafter the jurist ascends the ladder of fame according to his contributions to scholarship and success as a teacher. It has been estimated that before the partition of Germany after Hitler's War there were perhaps three hundred recognised legal scholars engaged in teaching. An able man may spend years of waiting before appointment to one of the coveted professional appointments.

The influence of this small group has been enormous and nowhere perhaps in the world does the legal scholar enjoy such prestige as he does in Germany, though in Italy public and professional recognition of legal scholarship is also marked. The present writer understands that an eminent professor in Germany may expect to be addressed by his double doctorate and that if he resists an invitation to move to another university, his students will honour him with a torchlight procession. The veneration of the student for his professor may perhaps be illustrated most strikingly by reference to the institution of Actenversendung by which very difficult questions of law might be remitted by appellate judges to those who had taught them, thus making the professoriate in effect an ultimate court of appeal. This institution no longer operates as formerly, but the tradition lingers on in the practice of counsel laying before the court opinions given by prominent jurists on difficult questions. If this practice causes the administration of law in Germany to smell somewhat of the lamp, it also keeps the leading academics in touch with the realities of life and law. In Scotland a comparable attitude can be discerned in the early Nineteenth Century when judges gave earnest consideration to what they had been taught by Bell or Hume, and even scrutinised notes taken of lectures given by these professors.

Judges in Germany are by contrast with those of Britain thick as the leaves that strew the brooks in Vallombrosa - approximately one judge for every six or seven thousand inhabitants. Those who qualify for this office normally undergo four years of practical training after passing the examination for Referendar; the training covering practical work in courts of different jurisdictions and in law and administrative offices. Thereafter,

the Assessor-examen is taken, and the successful candidate then becomes eligible for appointment as judge, is entitled to the designation (and designations are important in Germany) of Assessor. The judicial career, as in France, is one for which a lawyer opts from the outset. This is also true in the case of prosecutors, whose training is identical with that of judges. Indeed, it is possible, though rare, for lawyers to move from one career to the other. The prosecutor's status is that of an executive civil servant and he is bound to take orders from his superiors in the hierarchy. The German legal profession is clearly more appropriate than that of Scotland for analysis in Weber's¹² terms. Where he deals with types of authority, the bureaucratic is in general applicable to the German legal system.

Practitioners also undergo training comparable to that required of the judiciary. A period of up to four years apprenticeship is required, of which six months are spent in an office and the remainder in various courts and in a prosecutor's department. It will thus be observed that legal training for the German lawyer is stressed in the direction of the judicial and prosecuting function, and consequently lawyers in Germany are more disposed than in other jurisdictions described to reflect the official attitude. The office of notary carries considerable status especially in small towns, but the Anwalt's higher status corresponds with the advocate and solicitor in Scotland. He drafts legal documents, advises clients, and pleads in court. Law firms are recognised and there is no specialisation between the two branches of the practising profession as in Scotland.

It may be mentioned that many administrative officials in Germany must have legal training, while those who intend to enter commerce may also take

12. Max Weber The Theory of Social and Economic Organization (trans. Henderson and Talcott Parsons) p.333 et seq.

a legal training. Shartel and Wolf¹³ observe on this practice "Certain universities are not too strict about their standards of scholarship and grant doctors' degrees rather readily. A doctor's degree gives a definite social prestige, and even the most lenient standards do represent some degree of achievement." Of others who intend to become business advisers they comment, "These men do not intend to become members of the bar. They simply seek the titles of Doctor Referendar and Assessor for the prestige and training which these titles respectively represent."

Remuneration and professional status seem to be inseparably linked. From Roman times it has been regarded in civilian systems as a grave impropriety for any person to agree to advance money to carry on a law suit upon agreement to receive a proportion if the action succeeds, and such an agreement between the advocate and client was regarded as particularly obnoxious. The lex Cincia (B.C. 204) had prohibited advocates from accepting gifts in payment for their services. Under the Principate honoraria were permitted, and to the present day advocates in Scotland receive, strictly speaking, not payment for their services but honoraria for which they cannot sue. Anglo-American law is similarly concerned with the so-called contingent fee, a fee recoverable by a lawyer only in the event of success. In England such agreements are unlawful. In the United States, resort to the contingent fee is often in practice the only way by which the impecunious litigant can obtain legal representation. At least until the Legal Aid (Scotland) Act 1949 came into force, though much litigation was undertaken gratuitously by counsel, it was not considered improper to act on the understanding that a fee would only be paid in the event of success. Since legal aid is afforded in Germany to

13. 'German Lawyers - Training & Functions' (1943) 42 Mich.L.R. 521 et seq.

impecunious litigants the incentive of the contingent fee as in America is not such a pressing problem. In Germany what was then the highest court (Reichsgericht) pronounced as follows upon an agreement under which counsel sued his former client on a contract providing for contingent remuneration.¹⁴

"As in other cases it is thus necessary in the instant case to examine whether the violation of professional honour of which the pursuer has been guilty is so grave that persons whose views are just and equitable would consider it morally objectionable. This question has been answered in the affirmative by the Intermediate Appellate Court and rightly so. The applicable standard cannot be based upon the philosophy of those persons who think only in economic terms and who have no understanding of the special legal status provided for counsel. If this special status is taken into consideration the conclusion is clear. In making the arrangement with the defender the pursuer did not live up to the moral standard which counsel should never relinquish. He pursued his personal advantage so unscrupulously that his conduct, far from being in accord with justice and equity, must be characterised as morally objectionable."

Legislation followed upon this decision, but the relevant statute being itself repealed the position regarding contingent fee has been left to the courts. These take very much the same attitude as in the case mentioned above. Moreover, if counsel in Germany has made an invalid contract for a contingent fee and loses, he cannot recover even the statutory fee permitted for the work which he has done.

14. In G.v.F. Oct.20. 1933, R.G.Z. 142,70, the translation is substantially based upon Schlesinger Comparative Law, 2nd ed. p.350.

ENGLAND

Much has been written in recent years describing the state of the legal profession in England. Most of the available literature has been written by lawyers who represent with moderate or considerable impartiality the view which English lawyers take of themselves, but sociological studies are also available such as that of P. Abrams of Cambridge on the social background of English judges.¹⁵

The public image of the lawyer may not at the present day be as favourable as in the past, thus reflecting to some extent public dissatisfaction with the administration of justice in England. The prosecution of the publishers of Lady Chatterley's Lover; uneasiness regarding the prosecution of Dr. Ward, and the quashing of "Lucky" Gordon's conviction; the reporting (although he was exonerated) of the former Attorney-General, head of the English Bar, to the Benchers of his Inn for alleged unprofessional conduct in handling extradition proceedings concerning Chief Enaharo - all these affect the public image. John Mortimer writing in the Sunday Times on May 19th 1963, puts the question 'Are we still unconsciously allowing our legal system to be operated by a small section of the Establishment to the bewilderment of a large section of the community which no longer accepts its values.' Perhaps a social anthropologist could with advantage undertake a study of the English Bar.¹⁶

For one who is not a legal specialist the most helpful short non-technical study of the English legal profession is Lawyer and Litigant in England by R.E. Megarry, Q.C., though the present writer is not alone in concluding that the author presents the case for the status quo in an unduly

15. See ref. 'Sunday Times', 18th August 1963.

16. Institute of Advanced Legal Studies Annual Report for 1964 reports the preparation of a Ph.D. thesis in this field.

favourable light. Indeed, the Dean of Harvard Law School seems to take the view that the book was much too complacently written, and Professor H. Street's review¹⁷ observes with some exasperation "Must a Hamlyn lecturer be so complacent, so much on the side of the Establishment? Much of the argument for the status quo is unconvincing." Among other books which are more critical of the status quo than that of Megarry may be mentioned Henry Cecil's Not Such an Ass, and Brief to Counsel, which give a witty yet sincere account of life at the English Bar.

Unlike the legal systems already described, where there are local Bars enjoying more or less autonomous powers, the English Bar is highly centralised.¹⁸ Three quarters of all English barristers, including all Queen's Counsel have their chambers in London. In all, about 1900 barristers are in practice, and rather over 22,000 solicitors, who are distributed widely in England and Wales. Division of function between these two separate branches of the profession is of cardinal importance. Megarry observed¹⁹ "The main advantage of the English system of a divided profession is the obvious benefits which flow from all specialisation - each becomes expert in his own field." A barrister is never approached directly by a client, nor does he interview him in the absence of a solicitor. Moreover, he must not interview witnesses or undertake the preliminary paper work for a case. The theory is that solicitors (who usually practise in partnership and may specialise in particular types of law) can select from the 'cab rank' a specialist barrister to plead the client's cause. Barristers are not allowed to enter into partnership and are bound

17. (1963) J.S.P.T.L.(N.S.) p.139

18. Megarry, p.7 et seq.

19. p.11

to accept a brief from anyone who tenders an appropriate fee. Yet the barrister himself does not discuss his remuneration with solicitor or lay-client. This is left to the barrister's clerk, who fulfils a very important and responsible function in the English legal system. Megarry observes²⁰ that the barrister's clerk is his shield and buckler. The clerk is remunerated by ten per cent of the fees for counsel in his Chambers. A lucky one may earn £3,500 which will be substantially more than several of the barristers in the chambers earn. One of the most helpful things about Megarry's book is that he does give figures as well as facts. From the tables published on pages 184- 186, it appears that only at the highest professional level does the barrister earn more than his most successful counterparts in other professions. In the medium range, consultants, dentists, general practitioners and solicitors all earn more money. This may have some influence on the present drift from the Bar, but there seems little doubt that the status of barrister continues to attract more recruits than the profession can maintain.

One of the main attractions of the career of barrister is undoubtedly the very high prestige which it enjoys through the exalted image of the judiciary, all of whom are recruited from successful barristers. In the Continental systems the jurist or advocate may rank above the judges: this is most certainly not the case in England. Not only are the judges respected because of their office, with the attendant ceremonial factors of robes, wigs, deferential form of address and so forth, but they seem also to be appointed almost invariably from families whose social position is already assured. Abrams,²¹ states that of a hundred English High Court judges

20. p.68

21. See 'Sunday Times', 18th August, 1963.

investigated in his sample, 56 came from upper class or upper middle class families, and 24 from middle class professional backgrounds. Only two came from less privileged families. The educational background of the sample included 81 out of the 100 educated at Oxford or Cambridge (about half Christ Church or New College, Oxford or Trinity, Cambridge), while 39 went to Eton, Winchester, Harrow or Rugby. Distinction at the University seems also to be reflected in the judicial appointments, especially at the highest level. It may therefore be not unreasonable to infer that those who are most successful at the Bar, from whose leaders the Bench is recruited, have somewhat similar social backgrounds.

It does not necessarily follow that the majority of those admitted to the English Bar are drawn from this background. About 600 barristers are 'called' each year to the English Bar, and of these three-quarters are from overseas. Admission to the English Bar is thus largely for the export market; a legacy of Commonwealth and Empire. It may be questioned, however, whether the traditional eating of dinners and the life of the Inns of Court which was distinctive of the English Bar, is meaningful in the training of the overseas student in the standards and ethics of the bar. In this connection it may be observed that a belated effort is being made to establish law schools teaching English law in former colonies, but that American methods and standards are now actively competing there. There may be less need for barristers than for other kinds of lawyers in developing African countries, and the American tradition does not divide the profession. One interesting legacy of the English attitude is that when a very distinguished legal scholar and solicitor, Professor L.C.B. Gower of London, went out to

Africa, he was regarded by some African lawyers as their inferior in status because they had been admitted to the English Bar (an achievement less exacting than to become an English solicitor).

Of those barristers of British domicile who are called to the English Bar - of whom there are about 4,000 in the country - a substantial number do not intend to practise, but wish to enjoy the prestige of being barristers, though they are not allowed to use this designation on their cards or writing paper. Of those who actually started practice, many abandon a career at the bar. The Annual Statement of the General Council of the Bar for 1959 (the most recent figures available) prints a table covering a number of years. The figures for the year 1958 show that 24 more persons ceased to practise than started; and of those who ceased 44 of 112 had practised for over ten years, and 68 for less than that time. Paradoxically more persons had been actually called in that year than ever before.

In dealing with the English legal profession and with the Bar in particular, the writer has ventured to suggest that she may assume a greater general understanding than could be assumed when describing the position in France, Germany or America. The press frequently, and quite recently the lawyers on television, have presented varying images of the legal profession to the public. Accordingly, it has seemed permissible to select for comment certain factors about the English legal profession without undue elaboration of background.

The author of this thesis believes that the definitive work on the general historical background of the English legal profession will be published by Professor J.F. Dawson of Harvard Law School, who permitted her to read much

of his typescript. This in its turn acknowledges Dawson's debt to his colleague Professor S.E. Thorne, one of the greatest living authorities on early English law. The genesis of the English Bar is intimately associated with the Inns of Court - colleges as it were of practising, probationary and aspiring lawyers who intended to plead before the courts. (The solicitors' branch of the profession which in general is now better remunerated than the Bar lay for a long time under a cloud of relative social dis-esteem). Unlike the legal professions of the rest of Europe, including Scotland, the English Bar recruited its strength from those who (until the late Nineteenth Century) had not studied law in the universities, but had been indoctrinated with English law and its traditions through dining in the Hall of an Inn of Court, and through moots (or argument of hypothetical cases) in these Inns. The hierarchy of Masters, barristers and students in an Inn interacted closely through social life and exchange of thought and experience. Though the Scottish and Irish Bars²² have their social foci in the courts themselves and their professional activities centre on the Court libraries, or consultations at home, in England the Inn and professional Chambers are the background to a barrister's life. Though since the late Nineteenth Century many English barristers have studied law at the Universities, qualification for legal practice, either as barrister or solicitor, depends upon acquiring a professional qualification, altogether independent of university training. Formerly English lawyers were positively hostile to university law teaching. In the old days, as has been said, legal training was essentially based on the Inns of Court, where students ate together, received instruction, participated in moots and in general absorbed the independent and insular spirit

22. M. Healy, The Old Munster Circuit.

of the English Common Law. Today the formal qualification may be gained after eating dinners over a certain number of terms and by passing Bar examinations, themselves introduced about a century ago. These may be attempted after attending a 'crammer' or after taking a correspondence course. The Council of Legal Education does, however, provide courses of instruction for prospective barristers. To some extent those who set bar examinations have to take account of the fact that many of the candidates are from overseas and that their first language is not English. Solicitors in England take the examinations of the Law Society. These are almost exclusively taken by persons who do intend to practise in England and are British. The test is considerably more exacting than for the Bar and a period of apprenticeship of a practical kind is also required - five years, or three in the case of a university graduate. Thus from a social anthropologist's view the paradoxical situation is disclosed, that the English barrister is initially less qualified and usually earns less than the solicitor, yet enjoys greater social prestige. This paradox of status is due to history and public ignorance of the solicitors' function today. Dr. Johnson's sneering reference to attorneys as persons of low esteem still has its effect.

Though practising barristers are expected to have had a period of pupillage, the English Bar is perhaps the only profession into which a person can be received without any practical training whatsoever. In 1574 a barrister was forbidden to practise during his first five years after call. This period was reduced to three years in 1614, but the rule disappeared about 1700. Henry Cecil (His Hon. Judge Leon) has commented²³ 'One day there may be a rule that no pupil shall be allowed to appear in court until he has

23. Brief to Counsel, p.66

read for one year in chambers. Unless and until that rule is made the English Bar will remain the only profession where a person is qualified to carry on his business without ever seeing it conducted or knowing from the practical point of view how it is done.' In practice, however, most aspirants to practise at the English Bar serve as pupil for six months or a year. Megarry²⁴ while deploring the insufficient education of barristers in professional skills, is content that three of the four Inns of Court have rejected a proposal of the Bar Council that no one should be called to the Bar without undergoing six months practical experience as pupil to a barrister. On the other hand, he considers that pupillage should be required for practice. In short, he would separate status from function, like the absentee landlord or the sleeping partner. The cachet of being called to the Bar in England is valued as a privilege. Though persons who have been engaged in trade or in certain other lucrative occupations must purge themselves from this taint, coroners, justices of the peace, journalists, and some company directors, if not over-active, may be acceptable. Benchers of an Inn have discretion to accept or to refuse an applicant for admission, and are not required to state their reasons should they decide that the applicant is not a fit person to be called to the Bar. This discretionary power in theory and the fairly substantial dues payable for admission to the Bar and pupillage may exclude from the profession some persons who have the required professional ability. Unlike the situation in Europe where there are several Bars or orders of advocates, in England there is one only, but there are four collegiate societies (Inns) which have the powers of admission, suspension or expulsion. The basic powers to assert professional norms are vested in the

24. op.cit supra, p.103 et seq.

Inns of Court. The General Council of the Bar, which was formed in 1895, considers matters affecting the profession as a whole, such as conduct, discipline and etiquette, but has no executive powers over the profession.

Having qualified in law, an English barrister who seriously intends to practise seeks admission as a pupil in chambers. This (unlike the equivalent relationship between a devil and his master in Scotland) involves the payment of a fairly substantial fee - one hundred and ten guineas. Especially in the present situation when many overseas students wish to gain practical experience in England, it is very difficult to find a suitable master. Indeed those who are most anxious to take pupils are seldom the best masters. The problem of how to transmit the traditional professional ethics of the English Bar to those who intend to practice in former British possessions has for some time perplexed the Inns of Court and the Council of Legal Education. Since a very important step after pupillage is to find a good set of chambers, the initial choice of a 'master' is of considerable importance. If a young man aspiring to practice at the Bar makes a great success of his work as a pupil, he may be asked to remain in the chambers where he started, but if he does not, he must find a set of chambers which will accept him. This may be no easy matter. A man of ability accepted in good chambers may expect to succeed. Subtle factors of association, expertise and contacts of the clerk may help greatly. Since acceptance as a member of a set of chambers depends on the wishes of others already there, especially the head or senior in status of the chambers, social acceptance is relevant as well as legal ability. Here background, connection, and other features may be very relevant. It is unnecessary, perhaps, to develop the point that English barristers tend to specialise in particular types of work. A man, inclined to Chancery matters

will not gravitate to one of the Temples nor join the Old Bailey Mess.

The English barrister may eventually, after reasonable success at the junior bar, apply for 'silk', but there is less pressure on barristers to take this step in England than in Scotland, where the patent of Queen's Counsel did not come into general use until the late Nineteenth century. In England a barrister's papers are carried for him by his clerk and his bag may be either blue or red. The accolade - the red bag - is conferred by a silk upon a junior who has assisted him exceptionally well in some case, though rules have now been introduced limiting these gifts because the currency was becoming debased. Application for silk in England (for which a red bag is an almost essential preliminary) may be refused on first request to the Lord Chancellor, but, if granted, the barrister in effect launches into a new career in which the potential awards may be high or practice may dwindle. On average rather under 20 new Q.C.'s are created in England each year. Of every hundred perhaps half a dozen are senior lawyers in government service and one or two are distinguished academic lawyers. The rest have all been practising lawyers. It may be noted that the public image of Q.C.s disseminated through theatre, television and the press largely in connection with sensational causes, tends to be misleading and inaccurate. Those counsel who earn the highest fees and command greatest respect within the profession itself seldom attract the headlines. In England, though not in Scotland, the proximity of Westminster to the Strand has enabled many Counsel both to practise and to participate in politics as Members of Parliament. Such duality of function has become increasingly difficult for Scottish advocates. There is a tradition that barristers who become members of Parliament will be granted a patent of Q.C. on more lenient terms than others, and

hence they are sometimes designated 'artificial silks' by their professionally more proficient brethren. The effect of a political career upon counsel in Britain would justify a separate study. The influence of politics upon professional mores is not altogether beneficial.

The formal dress of barristers in England corresponds in general to that worn by advocates in Scotland though it will be noted later that the advocate is more formal. An English barrister, if not appearing before judges of the Supreme Court in the Strand could wear with wig, gown and bands a sub-fusc suit. Those appearing in the higher courts almost always wear black jacket and striped trousers, while Q.C.s wear a jacket of black cloth cut on special 'Court' style. Both in England and Scotland counsel address each other, out of court, by their surnames or, if intimate, first-names without formal style such as Mister, Sir, Lord, etc.

Remuneration of counsel in England is in theory too indelicate a matter for discussion between barrister and either professional or lay client. The clerk, as has been explained is the necessary 'honest broker'. A barrister cannot sue for his fee. He himself cannot be sued for professional negligence, yet the established counsel does not expect any longer to act from charity and, as Judge Leon has pointed out²⁵ complaints about English justice largely concern delays, expensive litigation and counsels' fees. The successful party in litigation seldom gets his remedy and his costs in full. If he selects a fashionable and expensive counsel he may have to pay a substantial proportion of the fees himself. Moreover, under the 'two-thirds rule' which operates in England, the fee of the junior who must be briefed to support the

25. Not Such An Ass, p.121.

Q.C. is geared to the leader's fee up to a certain amount. Legal aid to plaintiffs of moderate means has added a further hazard. Judge Leon notes²⁶ "Not long ago a legally aided plaintiff brought a case against several defendants which lasted for forty-one days. He lost it, and, while his conduct was severely criticized by the judge, the defendants were completely exonerated. Nevertheless, they had to pay their own costs themselves - that obviously is not justice." The same learned author²⁷ and also Megarry²⁸ stress that lawyers in England tend to discourage hazardous litigation, yet those who initiate it may have less to lose than those who are forced to defend. The great increase in legal claims against doctors and hospitals reflects perhaps a changed public attitude to medical men and institutions since State services have become available, while claims in respect of vehicle and factory accidents may well in the ultimate resort resolve themselves into battles between insurance companies in which the parties named are but symbols. These situations alter greatly the image of the lawyer as champion and hero, since this is largely linked in popular imagination with defence of alleged criminals, though it is worth noting that only in 1836 were those accused of felony permitted defence by counsel in England.

Traditionally the English Bar has upheld the very highest standard of professional integrity and etiquette, the standards of which are fixed not by the public, but by the profession itself. Megarry²⁹ states 'This brings me to one of the layman's deepest suspicions. Granted, he says, that there are these and other highly ethical rules of conduct, but who knows if you

26. op.cit. pp. 124-5.

27. Henry Cecil (Judge Leon) - Brief to Counsel, p.112.

28. Lawyer and Litigant in England, p.73

29. op.cit. pp.50-1.

break them? Surely it is easy enough to keep quiet about it. The answer is simple enough. The Bar is a small and honourable profession, and with very rare exceptions the rules are honourably and loyally observed. Often a breach of the rules would involve something like conspiracy with a member of another honourable profession - the solicitors. In any case, the word gets round. Exactly how, I cannot say, but it does. With very few reservations I would accept the word of a practising barrister or solicitor as readily as that of a bishop. This is the climate in which the Bar lives and the neophyte takes colour from his surroundings. He can soon see why it is that the Bench will at once accept the word of counsel from his place in court without sanction of the oath.³⁰ Megarry contrasts, incidentally, the attitudes of Indian and American lawyers (both systems derive from English law) to 'trial tactics.' Another leading Q.C. in England, C.P. Harvey, is less starry-eyed. He writes,³¹ 'I do not suppose there is any one of us who has been in practice for as much as twenty years who can lay his hand on his heart and say he has never transgressed the code of honour and conduct which he knows he ought to have observed.' Truth, perhaps, lies between the two statements. There is no doubt that awareness of belonging to a professional elite has a deep influence on the conduct of an English barrister, and this standard, as well as the screening off of the factor of financial gain has enhanced professional status.

It is unnecessary in this thesis to rehearse the better known professional rules for barristers in England such as abstaining from advertising, or touting for business. Judge Leon in Not Such an Ass,³² raises the hypothetical case of counsel testing a lying witness, who claims to have been at

30. The Indian and American legal systems derive ultimately from English patterns.

31. The Advocate's Devil, p.13.

32. p.163.

the theatre on a particular night, with the question "You remember, then, the comedian slipping on the stage, and falling into the orchestra pit?" No such incident had in fact occurred. Though the author states that one Benchers would not regard such cross-examination as culpable, he himself regards the matter as a deliberate lie quite inconsistent with professional integrity and justifying censure of the barrister who put the question by the Benchers of his Inn.

Drinker recalls, in Legal Ethics,³³ that 'In the old days a lawyer was disbarred by literally being cast over the Bar, which was a substantial barrier of iron or wood separating the court and its official staff from litigants and others.' Today the practice is less sensational and ceremonial. The Inn, which has in the first place called a barrister, where he will have shared a corporate spirit and exchanged "shop" with his brethren is also the disciplining body. All matters of discipline - expulsion, disbarment or suspension - are outside the jurisdiction of the ordinary courts, but the decisions of Benchers on these matters are subject to appeal to the Lord Chancellor and judges of the High Court sitting as a domestic tribunal.³⁴ Complaints of professional misconduct against members of the Bar after reference to the appropriate Inn, are first considered by the Joint Disciplinary Procedure Committee of the four Inns. This body decides whether a prima facie case has been made out for the Benchers of the impugned person's Inn to consider. The General Council of the Bar³⁵ 'Has since its inception answered questions concerning, and given rulings regulating, the etiquette and practice of the profession. Its rulings are matters of etiquette and not of law, and are not binding outside the profession.' (The procedure for striking a

33. p.34

34. W.W. Boulton, Conduct and Etiquette at the Bar, 3rd ed. 1961, p.1.

35. Boulton, *ibid*, p.3.

solicitor off the Rolls culminates in court action and is not a domestic procedure like disbarring).

What has been said with regard to barristers in England applies in general to both sexes. Judge Leon devotes chapter 23 of Brief to Counsel to "Women at the Bar." He writes,³⁶ 'It is only, however, fair to warn prospective women barristers that there is probably no profession where it is harder for them to make headway than at the Bar. There is no good reason to think that this is due to any lack of ability on the part of women or to any particular difference in the make-up of a woman from that of a man.There is still almost overwhelming prejudice against women both at the Bar itself and among solicitors and among the public. In consequence it is extremely difficult for a woman to find a vacancy in chambers. Moreover, on the whole, solicitors do not care to brief women and the public still appears shy of entrusting its fate to a woman.' He concludes that women have a better chance of success as solicitors.

This shrewd and sympathetic approach is confirmed by such further research as the present writer has carried out herself. A few women, like Miss Rose Heilbron, Q.C. and Her Honour Judge Lane, have certainly succeeded. Miss Heilbron's practice has tended to be largely identified with problems involving women. Women are accepted as advocates in France on terms of equality with men and the same is true of most Western European countries. Perhaps significantly in these countries they may be approached directly by their clients, and solicitor does not necessarily intervene as in England. Judge Leon is right in pinpointing prejudice in a traditional profession as a reason for the lack of success at the English Bar in the case of women. There may be some slight disadvantage for a woman in her range of voice, but

proper training should easily overcome this and certainly not all male counsel are audible.

Concluding this short account of the English Bar, it is suggested that its structure and function illustrate the factors of rationality, specificity of function and universality stressed by Talcott Parsons. In status, the successful member of the English Bar has probably figured more grandly in popular esteem in relation to the successful solicitor than is the case in Scotland. The English Bar has a greater monopoly of national court practice than is the case in Scotland. The barrister in court and chambers enjoys high prestige professionally, but the advocate in Edinburgh fulfils a more general social and more particular legal function which within a small community enhances his status above the barrister in England. It may be suggested that the pristine image of the English barrister has been to some extent blurred. As the courts become more accessible than the Ritz Hotel, more people can form their own impression of English justice, and may regard it perhaps as slow, expensive, ceremonious, courteous and in need of reform.

One final thought. In his review of Lawyer and Litigant in England, Street asserts;³⁷ 'It is indeed striking how little silks contribute to public life. Whereas every city has its solicitors who give up much of their time to voluntary good works, one seldom reads of the Bar rendering public service unless they are paid for it.' It has been generally accepted that gratuitous undertaking of public matters enhances the esteem in which a particular group is held. Formerly the English Bar have perhaps offered public service most conspicuously in the field of politics (before Members of Parliament were paid) and in rendering free legal aid before the Legal Aid Acts

37. (1963) 7 J.S.P.T.L. (N.S.) 140.

came into effect. If Professor Street is right in his comment, the public image of leading barristers and solicitors should be reversed, yet this would not seem to be the case. Perhaps this is in part due to history and in part to distorted publicity. Both branches of the legal profession in England have sought in a documentary television film The Lawyers, to create a favourable public image on the public. Professional rather than public service was stressed - 'professional' implying a special relationship of trust between lawyer and client rather than pursuit of gain; regard for a strict code of ethics and the transmission of a specialised and developing body of knowledge. Every lawyer knows that a litigant will fail to get all he wants through delay, uncertainty and expense. The English layman who believes that justice demands a quick and complete remedy may not have been convinced by this film of the need for such specialisation of function that a simple dispute regarding the spreading of tree roots must be fought out by barristers in the High Court in London. An American would be sceptical. A social anthropological study of the English legal profession should certainly follow up audience reaction to the film.

UNITED STATES

The United States, with the exception of the State of Louisiana, share with England what English and American lawyers call the Common Law. This is often contrasted with the other great legal tradition of the West - Civil or Romanistic Law. Louisiana like Scotland draws many of her legal principles from the Civil Law, but both have been influenced by the Common Law of their

neighbours.³⁸ The fact that so essentially English an institution as the English Common Law should have such world-wide importance today is largely due to the fact that the United States - which is now peopled mainly by citizens whose ethnic origins are not English, adopted the legal system of English Colonists when these did predominate. Despite the shared legal tradition of the Common Law, however, the American variety has come to differ in many ways from that of England, and the legal professions of the two countries are organised and function in ways which contrast strikingly. It must, of course, also be stressed that most generalisations about American Lawyers are perilous because of the difference between State practices and traditions, ranging from the New England States to those of the Far West and from Alaska to New Mexico. English barristers may be considered as a concentrated group. American lawyers cannot.

Riesman has suggested³⁹ that in America the judge is the hero image, and the higher the court the greater the prestige. Public attention and the training of law students are focused on the judicial process and on case-law. Riesman rightly discerns that very important functions are carried out by other types of lawyers than court lawyers, and suggests that re-evaluation of legal roles in society is desirable and that such re-evaluation should be reflected in legal education. He seems to under-estimate, as many American lawyers do, the importance of case law in codified systems. As a graduate

38. For a summary of the present position see T.B. Smith's Studies Critical & Comparative, p.XVII et seq. For the evolution of the Louisiana Bench & Bar, see H. Plauché Dart, The History of the Supreme Court of Louisiana 1334 Rep p.XXX - also papers on the Louisiana Bar & The Court & Jurisprudence read by Thos.W.Leigh & Judge John T.Hood on the occasion of the Sesquicentennial celebration of the Supreme Court of Louisiana on 7th March 1963 and now published as The Sesquicentennial of the Supreme Court of Louisiana (1964).

39. (1951) lvii Am.J.Soc.121.

of Harvard Law School, he appreciated at first hand the importance attached to the 'case book' method of legal education there, and the resulting formation of the judge hero image. The present author is not a lawyer and would not contradict Riesman in his specialist field. She may, however, offer a certain gloss based on a limited period of observation and fairly intensive discussion with leading American lawyers, social anthropologists, and informed citizens generally.

First, bearing in mind the current tradition of American legal education, of which Harvard is the leading exponent, it is surprising that the judiciary have become 'hero images' for the lawyer in training. The so-called 'Socratic discussion' of cases involves as a rule at a very early stage intensive criticism by students of the 'problem solving techniques' of the judges. Under the influence of certain teachers, moreover, particular Justices of the Supreme Court become objects almost of antipathy. Secondly, in the United States there are many categories of judges. Some, like those on the Federal Courts, are permanent appointments; others, like judges in the State of New York, are elected on a political basis for a period of years, but if a New York judge gains professional esteem, he is likely to be continued in office for his working life. Other judges are elected and hold office only so long as the political party to which they are affiliated remains in power. The prestige attaching to the American judiciary - if such a general expression can be justified at all - is not necessarily uniform. In general it is not as great as that which is enjoyed by the English judges, the prestige of whose offices are enhanced by tradition, ceremonial and by the fact that their party politics do not in modern times influence appointments or tenure. Nevertheless, since the Supreme Court in the United States is ultimate custodian

of the Constitution, its Justices have very great prestige and exercise greater power than the judicial members of the House of Lords in Britain. The latter have never held an Act of Parliament to be unconstitutional, though the Supreme Court of the United States may reject an Act of Congress. Again, by construing the basic Constitution very flexibly the Supreme Court acts deliberately as a law maker and law reformer, developing social trends which appear to them desirable and ~~curbing~~⁴⁰ those which offend them.

Passing from the judges a short account of the legal profession in the United States will be attempted. In colonial times - and perhaps to the Americans alone this word is not pejorative - those who aspired to practice went to study at the Inns of Court in London⁴¹ and on their return became leaders in their respective communities. During the early part of the Nineteenth Century however, professions and privileged organisations such as Bar Associations tended to be regarded as undemocratic and un-American. One result was the lowering of standards in such matters as character, education and training of lawyers.⁴² Several states provided that any voter of good moral character might practise law (Dean Griswold has told the author that this is still true in one State, though the law has been construed to the effect that, bearing in mind the complexity of the law, 'no person of good moral character would resort to practice unless he had been trained'). In the period which followed the Civil War (the late 1860s and 1870s), standards sank to the lowest level in legal practice. Emeritus Dean Roscoe Pound in The Lawyer from Antiquity to Modern Times,⁴³ records the cycle 'From recognition at first that the legal profession as a whole had problems, functions and obligations

40. See in partic. E.N. Griswold Law and Lawyers in the United States, Chapters 4 & 5 passim.

41. Drinker, Legal Ethics, p.5.

42. *ibid.* p.20

43. p.223

transcending those of the individual lawyer or group of lawyers, to gradual loss and finally all but giving up of the professional idea, thence to the gradual regaining of that idea and final achievement of it again in the integrated state bar of today.' Whether the achievement is final or complete is a question of opinion. In the same work Pound states that in his view 'the term "profession" refers to a group of men pursuing a learned art as a common ~~cause~~ calling in the spirit of a public service - no less a public service because it may immediately be a means of livelihood. Historically there are three ideas involved in profession; organisation, learning, i.e., pursuit of a learned art, and a spirit of public service. These are essential.'

Not all Americans would venture to assert that public before private interests and trust relationship rather than eagerness for economic reward was uppermost in the minds of all the legal profession. In a lecture delivered to Cornell Law School in 1938, Professor Arthur E. Sutherland of Harvard considered frankly the lawyer's image of himself, and his image for the public.⁴⁴ Could not his life have been spent more satisfyingly in other work?⁴⁵ A lawyer was bound to reflect on the peculiar dislike which lawyers as a class seem to attract, especially in times of hardship. A tricky and grasping shyster has always been a favourite subject for novelists,⁴⁶ and Sutherland, himself a lawyer of outstanding integrity, quotes the American adage, 'Why does a hearse horse snicker? Hauling a lawyer away..... A calling which is widely distrusted and misunderstood, is not by any to be entered upon unadvisedly or lightly.'

Sutherland points out that their first contact with the administration

44. (1938) 34 Cornell L.Q. 545.

45. *ibid* 545.

46. *ibid* 546.

of justice will form the citizens' impression of its justice. 'Socially speaking, the administration of justice in Magistrates' Courts may be far more important than in an Appellate Tribunal.'⁴⁷ T.B. Smith has expressed a similar thought in connection with Scotland:⁴⁸ 'If the quality of a country's laws may best be assessed by considering the pronouncements of the highest tribunals, the quality of a country's justice is most frequently tested in those lower courts which handle the great bulk of civil and criminal business.' Sutherland⁴⁹ observes that a lawyer 'sees an army of young men crowding to be admitted to the Bar, and rightly expects that his struggle for a livelihood will be hard and discouraging. No very good remedy for this is apparent, but if the lawyer could look for popular respect and esteem to compensate for his small earnings, he could be more contented.' This factor of popular esteem is again stressed⁵⁰ in another context. 'The professional function of the defendant's lawyer calls for considerable art; for he must see that the accused is acquitted if this is decently possible, and at the same time he ought to keep in mind his duty to the administration of justice in general and relate his specific case to it. While very few practitioners fail to recognise that in the practice of advocacy the interest of the client is always to be preferred to that of the advocate, quite a number forget that the general public is the collective client of the Bar, and that where there is a prospect of the improvement of judicial procedure, the Bar should be the first to welcome the change, though it be at the expense of its members.' During her visit to Philadelphia, the present writer met an eminent American practitioner

47. *ibid.* 548

48. British Justice: The Scottish Contribution p.53

49. *op.cit.* p. 547

50. p. 551

who resented the Bar Association's policy of requiring lawyers to charge a minimum fee. This he regarded as an encroachment of his right to spare the pocket of a client of modest means. No doubt, as Professor Sutherland implies, not all American lawyers put their financial advantage as a secondary consideration, and it has been suggested that not a few Scottish Advocates supported the retention in Scotland of the alien system of civil jury trial because it suited their practice. The attitude of a minority in a profession, if sufficiently publicised may affect the public image and, in Sutherland's view, it is necessary to educate the public regarding the efforts of the Bar Association to better the administration of justice⁵¹ 'If the public comes to feel that the Bar is fulfilled with a truly disinterested zeal for the general good, and is consciously making an effort to make justice quicker, cheaper and more certain for everyone the lawyer will begin to enjoy a new public trust.' He also stresses that a lawyer's reputation for legal scholarship enhances his prestige, both with the public and with his colleagues,⁵² 'In the presence of learning, he (i.e. the man in the street) is subdued, for he knows that the scholar could not buy his scholarship.'

Writing his paper in 1938, Sutherland did not and, indeed, could not have foreseen the change which war would bring in the status, both of his country and of his profession. He looked back on the American lawyers of the past; the young pioneer with Blackstone in his saddle-bags, the rise of the corporation lawyer in the era of industrial expansion, the setting up of huge, departmentalised law firms. The last, he thought, might be on the way out,⁵³ 'Possibly these changes may make our lawyer what his brother is today in some European nations, an individual consultant and advocate, generally having his

51. p.552
 52. p.556
 53. op.cit. p.558



chambers and his library in his dwelling, with a much smaller amount of office machinery than we now think necessary.' In short, Sutherland was describing the ideal image of the advocate in Scotland at the time he spoke, consulting in his own home, surrounded by his books; and with virtually no office equipment. This has not, however, been the recent trend in America. Law firms are very large and very specialised in the more populous cities, and probably have become more prosperous than ever before. The great number of books, especially Law Reports, used by an American lawyer in practice, seems, in effect, to preclude him from working at home. He works long, hard office hours like a business executive.

Other informed observers of the American scene, e.g., Harlan F. Stone, 'Public Influence of the Bar'⁵⁴ noted that the emergence of new and complex economic forces in America during the Nineteenth century, found 'the American Bar like other elements of the life of the nation, ill-prepared for a change so wide and sweeping. The rise of the big business has produced an inevitable specialisation of the Bar. The successful lawyer of our day, more often than not, is the proprietor or general manager of a new type of factory whose legal product is increasingly the result of mass production methods. More and more, the amount of his income is the measure of his professional success. More and more, he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business rather than to the intangible and indubitably more endurable satisfactions which are to be found in a professional service more consciously directed towards the advancement of public interest. Steadily, the best skill and capacity has been drawn into the exacting and highly specialised service of business and finance. At its best

54. (1934) 48, Harv. L.R. 1, p.6.

the changed system has brought to the command of the business world, loyalty and a superb proficiency and technical skill. At its worst, it has made the learned profession of an earlier day, the obsequious servant of business, and tainted it with the morals and manners of a market place.'

Stone observed⁵⁵ that the American lawyer had stood highest in public esteem when he dealt with great public problems such as immunity from arbitrary arrest. Today, public thought is largely concerned with anti-social business practices, yet lawyers have been slow to deal with these. His solution to the problem as to how the public image of the American lawyer could be improved depended largely on the Law Schools in co-operation with the leaders of the Bar. He observed wisely, however,⁵⁶ 'I do not refer to the teaching of professional ethics. I have no thought that men are made moral by the mere formulation of rules of conduct, no matter how solemnly the Bar Associations may pronounce them, or that they may be made good by exhortation. But men serve causes because of their devotion to them.' He had in mind a new emphasis in legal education. Law Schools in America have raised their standards to require a high degree of efficiency, but insufficient stress has been given to 'the social responsibility which rests upon a public profession.'

In the light of these statements and solutions put forward by eminent American lawyers, the present writer will venture a few short comments on American legal education and on the Bar Associations. Between these, responsibility seems to rest for creating the lawyer's own image of his profession.

American lawyers, unlike those in England, are almost always the product of a law School. There are State Bar Examinations but the real training and testing does not have these as a target as do the Bar Examinations in England.

55. op.cit. p.13.

56. ibid. p.14

Since there are many States, each with its legal system, generally speaking, State laws are ignored in law teaching. Some small State Law Schools concentrate on the local system; but the big national Law Schools, such as Harvard, attract students from all parts of the United States. The legal education which they give is thus general in the sense that Civil Law used to be taught in Europe before the national codifications. Interestingly perhaps, the status of a Law Professor at a leading Law School stands high, in particular at Harvard. Leading American law teachers are not, on the whole, 'academic types,' but usually have had active professional experience and undertake many public duties which command the esteem of law practitioners. Many are constantly consulted at top Government level, others act as arbitrators in labour disputes, others revise legislation, others through the American Law Institute and otherwise put forward projects for codification and revision of the law. The Deans of the Harvard Law Schools are particularly respected, and in an American University, Deans generally have considerable responsibility and prestige. Training in Law School is essentially professional in orientation. From the outset, a spirit of competition is inculcated, and the first year student is ruthlessly subjected to the so-called 'Socratic' or 'case book' method. He is trained to be a problem-solver rather than as a legal theorist. One of the most interesting accounts for one who is not American is A.E. Sutherland's La Formation du Juriste Americaine, an address delivered at Grenoble on 7th December, 1956. In particular he justifies the present pattern of American education because of the complexity and detail of the American Legal System. Professor Sutherland's address was aimed at a French audience. During the writer's time at Harvard, she attended a colloquium on legal education with a number of foreign students (some teachers of law in their own countries). Those who had been trained in

the Civilian systems were unanimous that, though the 'case book and materials' method was useful as a teaching technique in small groups and with students who had received systematic instruction in subjects being discussed, this method was not suitable for teaching civilian students in their first year. The method was slow, and the inaudibility and irrelevance of some of the discussion wasted the time of many in the larger classes. Already it would seem that some modification in the system is thought desirable, even in America. It certainly has the merit of having superseded the reiterated set-piece lecture sometimes common in our own country. After the first year, a really crucial year in the career of an American lawyer, students are given a wide range of 'electives' to choose from and instead of the very large classes, they may meet in smaller groups, which are better suited for close oral discussion.

The competitive spirit which American legal training encourages is no doubt reflected in later life by those who aspire to and gain the best paid jobs in law firms. Those who are in the top few per cent of the first year, go on to the Law Review, which carries status for the rest of the editor's life, somewhat like getting a first or gold medal for the most distinguished graduate. From this select group law firms do their recruiting, and the starting salaries offered to the top law graduates of the leading Law Schools are very high. These, having taken a first degree before a Law degree are very frequently married with children. To many women a Harvard Law graduate, especially if he is on the Review, is a very good 'investment' for matrimony. It is perhaps also worth noting that students assess each other's status by the grades each has earned at Law School, e.g., 'A average' at the top with 'C+ average' rating as mediocrity. Competition is, however, man against man, not against

Bogey, and the consequences of being one-up may determine a man's career. Thus a student who missed one examination out of four in his first year diet, having had an operation for appendicitis, felt that his ambitions had been permanently frustrated. The Librarian of one Law School (not Harvard) complained that students would abstract books not so much to use them, as to impede the studies of competing students.

Among the branches of study most favoured are corporation (i.e. company) law, taxation, trusts, investment and so forth. The more purely academic subjects such as legal history and Roman Law are taken by very few. Comparative Law is attracting increasing interest, and the most ambitious clearly contemplate a career which will have world-wide legal interests.

The most brilliant or successful students may have, in America, an experience which has its counterpart in some European countries. They may serve for a year as 'law clerk' to a judge. Not only does this give them insight into how the judicial process works, but it also exposes the judges to indirect indoctrination with the latest Law School thinking. This probably fosters a closer understanding between law teachers and the judiciary, and of course in American, unlike England, there are not infrequent instances of judges becoming professors, and professors judges.

A law graduate in American may go into a large or a small firm, into industry or into Government service or practise as an individual. With a population of over 180 millions, the United States has about 296,000 lawyers. Of these, some 200,000 are in private practice, 26,000 in industry and 29,000 in Government service. Dean Griswold⁵⁷ points out that, though the population

57. Law and Lawyers in the United States, pp 5-6, The proportion of lawyers in Scotland to the total population of the country approximates much more closely to the American pattern - though, of course, the percentage of advocates in the population is much smaller than the percentage of barristers in England. See M.C. Meston's review 1965 S.L.T. (News) 64.

of the United States is nearly four times that of the United Kingdom, it has more than ten times as many lawyers. Those who practice on their own in America⁵⁸ tend to have lower educational qualifications than those in firms, and more often come from working class and entrepreneurial families of minority religious and ethnic status.' Very large firms have specialists for each particular aspect of legal work. Some firms specialise in finance, like those in Wall Street, others, so well described by Horsky in The Washington Lawyer, are largely concerned with what could crudely be described as 'lobbying in Congress.' There are, however, very many small law firms throughout the country, and many men do not aspire to the intensive work of the big town. They live useful and respected lives in the smaller communities. One contrast with the situation in Britain may be stressed - the small town lawyer may be admitted to practise before the Supreme Court of the United States and will probably seize the chance of a lifetime if his case has to be argued there. The Washington firms do not, as in London, have a monopoly of ultimate appellate work. Here, specialisation of function does not operate.

Traditionally, the legal profession combined with politics, has provided a ladder to the most influential public positions in the country, the President, Secretary of State, Attorney-General, and so forth. An excursus into American politics would be out of place, but it may not be altogether irrelevant, in considering the status of the American lawyer, to suggest that the influence of politics on the profession has not been altogether favourable. Among the contrasts which may be made with British practice, one may note that an Attorney-General who goes out of office usually returns to the large firm with which he

58. *ibid.* p.30

has been associated before. Judicial appointments are closely linked with politics. At the top, even certain Supreme Court appointments have been strongly influenced by political considerations, while in many States, judges are elected and hold office, subject to re-election. If the judge's party goes out of office he may go too, returning to practice. Such a judge has to consider his public image and his relations with the practicing profession much more than is the case in Britain. Moreover, relatively he enjoys less prestige in relation to counsel. Judges are robed simply in black; counsel do not wear robes, though some of those appearing before the Supreme Court wear morning dress. In general, their working dress is that of business men.

The author saw many American lawyers during her visit, but, even so, visited only a few main centres of so vast a country as the United States. It seemed to her that, however justified Sutherland may have been in 1938 in his observations about the smallness of rewards and the unfavourable public image of lawyers, the profession today attracts more and more recruits who are convinced that by hard work and competition, they can earn very high salaries. A more relaxed attitude was apparent among leading lawyers in Louisiana, where she formed the impression that a lawyer's life was more amiable, relaxed and social than was possible, say, in New York. Since family tradition and a more or less set order of society seems to be established in Louisiana, the general public image of the lawyer within the state may be more favourable in some ways - though this is cut across by aspects of politics which affect the national image. That a District Attorney in 1963 should have made political capital out of the prosecution of 'strip joints' and should have accused judges in New Orleans of corruption, was somewhat startling. Such professional behaviour would have been almost incredible in New York or Boston.

Through courses at Law Schools on 'The Legal Profession' or 'Legal Ethics', and through law teaching generally in the best Law Schools by men of high principles, the aspirant to practice in America is made aware of the special obligations of his professional role.⁵⁹ The other main influence on professional behaviour is the formation of Bar Associations.⁶⁰ These were set up to resist the post Civil War commercialisation of a lawyer's work, and to establish adequate standards of character, education and training for the profession of law. The American Bar Association was organised in 1878. Its objectives include 'The maintenance of high standards of legal education and professional conduct to the end that only those properly qualified so to do, shall undertake to perform legal service.' Bar Associations have also been set up in all the States of the Union, and in the District of Columbia with like objects. In 25 States, the Bar is integrated, an expression which has no reference to the racial questions, but which means that every practising lawyer must be a supporting member of one of the Bar Associations, and as such adhere to its canons, ethics and discipline. In all other States, voluntary Bar Associations are established, but membership is not compulsory. As a result, the less scrupulous need not accept the Associations' standards. These standards are usually set out in 'Canons of Professional Ethics'. Some State Bar Associations have drafted their own canons, while others have adopted those of the American Bar Association. All are strongly influenced by the American Bar Association's canons, and by the interpretation of them by the American Bar Association's Ethics Committee. These canons cover the lawyer's obligations to the public,

59. For teaching & research material see esp. Drinker Legal Ethics and Cheatham Legal Profession (passim)

60. For a realistic assessment of these see Griswold Law and Lawyers in the United States, pp. 28-29.

to the court, to his client, and to other members of the profession, and deal with such matters as advertising and soliciting business. Among the main contrasts with the English legal profession, may be mentioned the fact that 'the Bar' in America does not imply the same specialised function of the English barrister, but comprises those who discharge barristers' or solicitors' functions. Disbarment is a function of the court, not of an Inn; 'contingent fees' are permitted; and Bar Associations may advertise within limits. The contingent fee, an arrangement by which a lawyer takes on a case on the understanding that he will be remunerated if he succeeds, may be regarded as quite ethical,⁶² and indeed in Scotland, before legal aid, the practice was not disapproved as in England. Advertising is regarded as ethical if carried out, not by individuals but by organised Bar Associations 'to enhance the esteem of the legal profession' and the judicial process. The Legal Ethics Committee of the Michigan Bar Association in an opinion⁶³ as to the propriety of a 'radio sketch', stressed that the advertisement must be carried out in such a way 'as to avoid the impression that it is actuated by selfish desire to increase professional employment'. Radio advertisement was permitted. Perhaps a relevant comparison would be with the film 'The Lawyers' which was sponsored by the English Bar and Law Society, again to promote and correct a popular image of the lawyer in society.

To generalise about the American legal profession is, because of its diversity, and numbers, impossible. Unfortunately, popular television programmes have too much promoted a public image of the criminal lawyer, using 'trial tactics' in courts where the formal trappings and reserved manners of British justice are noticeably absent. The public image of a criminal lawyer is not the image he

62. See Drinker p.176 et seq.

63. See Drinker op.cit. p.257.

presents in the legal profession as a whole. Indeed, those who take criminal work are often in effect despised by other lawyers, the attitude being that a lawyer becomes like the type of client for whom he appears. Counsel appear in lounge suits, and sit beside an accused client. Justice Brennan in 1963 at Harvard, stressed the need for the country's leading lawyers to take an active and less 'holier than thou' attitude to criminal practice. Where, however, the criminal law indirectly involves questions of civil rights, e.g. liberty, racial equality and so forth, criminal practice becomes respectable. The constitutional issues overshadow those of crime. Dean Griswold of Harvard Law School, presides over the Committee which investigates invasions of civil liberty throughout the United States, and his great prestige has an effect on the law student and practitioner in the general defence of civil liberties in the Courts.⁶⁴

In conclusion, we may note that, where the canons of ethics laid down by the Bar Associations are fully observed in the spirit as in the letter, America produces lawyers of the highest professional integrity, and the leaders of the profession are usually such, though more commercially orientated than in Britain. At the other end of the scale may be found lawyers, as in Houston, Texas, who are prepared to explain on television the tactics which they used to distract a jury's attention, and who perform before television cameras at capital trials. The general public image of the American lawyer is therefore somewhat blurred or contradictory, and the bad tends to oust the good among those who have had personal and unpleasant experience of the law in action.

64. See generally his Law and Lawyers in the United States, chapter 5 passim

Chapter 3THE EVOLUTION OF THE FACULTY OF ADVOCATES: ITS SOCIAL AND PROFESSIONAL SETTING

The evolution of the Faculty of Advocates and its social and professional setting must now be considered in some detail. Although the expression Advocate is used in early Scottish Statutes such as the Act of 1424, c.45, which provided for legal aid to the indigent, the Faculty of Advocates as such dates from 1532 when the Court of Session was constituted as a College of Justice. Before this time, though friends of litigants could appear as unpaid amateurs, there had of course been professional lawyers, lay and ecclesiastical, variously described as 'fore-speakeris', 'procurators' or 'prolocutors'. The functions of advocate and solicitor had not yet been differentiated, though those of the notary had been set apart for historical reasons. In the sixteenth century the law teacher was essentially an ecclesiastic. As early as 1455, a distinctive costume (a green tabard) for pleaders was prescribed by Act of Parliament.¹ Between 1496 and 1501, at least a dozen pleaders can be identified as in extensive practice before the highest courts, and procurators appeared regularly in the Sheriff courts.² The position of Notary also flourished in Scotland as on the Continent, though from 1469 the King asserted the exclusive right to appoint candidates for that branch of legal practice. It was exercised mainly out of court.³ By the Act of institution of the Court of Session, the designation 'Advocate' is applied

1. A.P.S. ii. p.43, c.12.

2. See Cooper, Selected Papers, p. 231 et seq.

3. See Introduction to Scottish Legal History, Stair Society Volume 20, pp. 23, 29, 33: J.C. Brown, The Origin and Early History of the Office of Notary; Anon. The Office of Notary (1792).

to the procurators who have qualified to plead before that Court. It was provided "that thair be a certain nommer of Advocates and Procurators to the nommer of ten persons of best name, knowledge and experience admitted to procure in all actions". The business of the Court soon required this limit to be exceeded. By 1587, when Advocates were first allowed in cases of treason and appeared regularly before the Criminal Courts⁴, the Faculty of Advocates comprised 54 practitioners. The numerical strength of the Faculty over the centuries has fluctuated but, bearing in mind the increase of the national population, is probably approximately the same percentage today in relation to the national population as in the sixteenth century, and much less than in the eighteenth and nineteenth centuries. The exclusive privilege of appearing before the Supreme Courts in Scotland has always been restricted to a small group. In 1762, the number of those who had been admitted to the Faculty was 210, in 1794 there were 236, in 1810 nearly 300, in 1826 nearly 400 and in 1832, the year of the First Reform Act, a peak figure of 442 was reached. In 1848, numbers had fallen to 425. This was maintained up to 1861 though only about 120 were actually in practice. The status of Advocate was sought for its own sake, even by those who did not intend to practise. In 1876, there were 377 members of the Faculty of Advocates of whom about 130 actually attended the Courts⁵ and in 1965 there are some 300 members of whom just over a third are in daily attendance at Courts.

The development of the corporate existence of the Faculty can be traced with reasonable accuracy and it is clear that the present specialisation of

4. See Acts, 1587 cc. 38-91 Graham v Cuthbert, 1951 J.C. 25.

5. See Mackay, The Practice of the Court of Session; i, p. 103.

function did not always exist. Thus, Mr. David Ayton, a prominent Advocate was 'doer' to the Earl of Rothes, and as late as 1762 Advocates resisted attempts by law agents to organise themselves as a separate branch of the legal profession. The Society of writers to His Majesty's Signet was fully organised in 1594 but on the establishment of the Court of Session in 1532 the Writers, like the Advocates, had been incorporated in the College of Justice itself. Advocates and Writers to the Signet frequently united to defend their common privileges and at one time fusion of these two bodies seemed probable.⁶ Though in origin both bodies had just been associations of lawyers like others throughout the country, through their close connection with the Central Courts they soon established themselves as exclusive and influential groups, restricting admission to their ranks by social, financial and educational controls. An applicant for admission to these professional groups was moreover required to have undergone a practical training or apprenticeship under an established member of the group from whom he learned not only the necessary skills but also the ethos of the group. This thought will be developed at a later stage, discussing what is loosely called 'devil-ling'. The division of the legal profession in Scotland between Advocates and Solicitors might well have taken a different course: namely, between legal bodies incorporated in the College of Justice and those not so privileged, i.e., those who belonged to the faculties of procurators who practised in other courts. Indeed, a provision in the Union of 1707 provides for the possibility of appointing Writers to the Signet as well as Advocates to the Bench of the Court of Session. By specialisation of function, however, the

6. Introduction to Scottish Legal History, p. 29.

Society of Writers to the Signet has merged without losing its identity into the Solicitors' branch of the profession, which has since 1949 required membership of the Law Society of Scotland. The Faculty of Advocates shedding the function of law agents and specialising in advocacy, are to be widely regarded as the élite of Scotland.

Partly through Acts of Sederunt passed by the judges and partly through a growing sense of professional solidarity, the advocate's role and position in the community was worked out. As from 1582 the Faculty elected one of its number to the office of Dean corresponding to the Bâtonnier in France, and successive holders of the office of Dean have been the acknowledged leaders in the matters of professional etiquette and in asserting the Faculty's rights and privileges. The Faculty has always been an exclusive 'club' restricting membership by controls in respect of qualifications, the requirement of a substantial financial contribution and to some extent in the past by a social exclusiveness. To this day, the formality of a ballot for a new intransigent takes place. Admission is not a right which can be demanded on proof of professional competence.

The custom⁷ of foreign study and education which prevailed until the end of the eighteenth century provided Scots Judges and Advocates of the past with a more cosmopolitan and European outlook on legal and social problems than may be observed in their successors who, if they have studied outside Scotland, have usually done so at Oxford or Cambridge. Much of the anglicising of Scottish Law comes from the mid nineteenth century and may well be due to the cultural conditioning of so many of those who practised and administered it after the European trained generation had died out. The anglicisation of the Scottish middle class is in itself a phenomenon on which extensive research could be undertaken, and is outside the scope of the present thesis. Some consideration

7. See Boswell in Holland, Ed. Pottle passim. T.B. Smith Studies Critical and Comparative esp. pp. 28, 33, 51 and 57.

of it, in connection with the Faculty of Advocates is, however, essential since this small group, Scottish in origin, and professionally immobile, has been influential in the national life far beyond the field of law. For the sake of perspective, the social setting of the Faculty and its members will be described briefly as at different key periods before and after the Union with England. Social and political factors rather than legal trends should determine the divisions, but, as with any historical process, dates indicate water sheds rather than boundary walls.

From the Institution of the Court of Session to the Union, 1532-1707

Until after the Restoration, the Members of the Faculty of Advocates had a high status, but the Faculty itself had little control over its own membership. Those deemed eligible had either studied abroad or had gained experience as auditors over a considerable period of time. The Judges controlled admission - sometimes, it was suggested, without discrimination - and those who were admitted were anxious to keep numbers low. Rôle segregation was not, however, absolute. Thomas Hope was admitted to the Faculty in 1605. He 'had been' servant (? devil) to an advocate in 1599 and also after admission acted as 'solicitor' in cases affecting Crown interest in ecclesiastical property.⁸ Among the privileges then enjoyed by Advocates as members of the College of Justice were exemption from taxation and priority for the hearing of their personal actions in the Court. In 1589, 70 Advocates who had already been admitted objected to the institution of a Chair of Law in Edinburgh, allegedly because they were not fully employed and because there was already "as much law in Edinburgh as siller to pay for it". The Faculty's distrust of legal education in Scotland except under its own control, which still to some extent continues, may be contrasted with its encouragement of intrants to acquire higher education in the Liberal Arts and its permissive attitude to

8. Hannay College of Justice Introduction p.xv.

legal studies abroad.

Before the Reformation, though Elphinstone's Foundation at Aberdeen was intended to provide legal education for laymen, University Law teaching in Scotland was based on the Civil, Roman and Canon Law. Those who studied in Scotland were largely clerks and one of the important consequences of the Reformation was the laicizing of the legal profession. There was, of course, no University Law School in Edinburgh and this seems to have been largely due to the hostility of the Faculty of Advocates. Lord President Reid's bequest in 1558 to endow a College of Arts and Law in Edinburgh was misappropriated, and, though in 1590 the College of Justice and Town Council contributed to establish a Professor of Law, neither of the two persons appointed taught law at all. The Book of Discipline in 1560 contemplated a 4 year course in Municipal (i.e. Scots) and Roman law, to be given at St. Andrews, Glasgow and Aberdeen, but not in Edinburgh and significantly also replacing the study of Canon Law with Scots Law. However, these proposals were not implemented. It may be that frustration of the original plan was due to the influence of the Geneva theocracy upon that of Scotland. The Geneva ministers opposed the erection of a Law Faculty there because "those who apply themselves in this Faculty are, for the most part, of dissolute habits, being young men of quality". Certainly, those who aspired to practice in the Court of Session in the mid sixteenth century were, in general young men of quality. They sought their basic legal education in the Law Schools of France up to the Restoration period and picked up their knowledge of the specialities of Scots Law through observing the business of Parliament House and through private instruction from established Advocates.

The first Advocates seem to have been admitted without any trial of fitness, on the personal knowledge of the Judges, but in 1610, the Faculty petitioned the Court that none should be admitted who had not either studied philosophy at some university and thereafter law for 2 years or had been brought up "under some old learned Advocate" for 7 years, and had given proof of his ability to the Faculty. By Act of Sederunt in 1619, 12th February, an examination and thesis in the Civil (Roman) Law was made compulsory as the ordinary mode of admission. An extraordinary method was, however, prescribed according to which an intrant was examined in Scots Law only. In this case he paid double fees and composed no thesis. Qualification through the Civil Law was regarded as the more honourable mode of entry.

An apprentice advocate acted as 'servitor' or 'devil' to his master and, on occasions could appear for him in Court. Sir Thomas Craig, who wrote his first treatise on Scots Law for the benefit of the students, compiled it in the last years of the sixteenth century and first few years of the seventeenth. He had taken an Arts degree at St. Andrews and had then studied law in Paris before his admission to the Faculty of Advocates. He practised for 45 years. Of him Lord Clyde has written⁹ "the tradition of the Bar to which he was called in 1563 has always fostered and happily still fosters among its members, a blend of professional and public ambitions favourable to the attainment of a poise of mind in which conscientious loyalty to precedent and authority is balanced by broad conceptions of legal principle. Craig is never a mere lawyer, Law as he sees it is the science of right and occupies its proper place in relation to the wider Sciences of Government, Politics and of Humanity itself".

9. Jus Feudale, i, Translator's Note xx.

Despite his eminence as Advocate, Craig was not appointed to the Bench. The custom of appointing Senators of the College of Justice exclusively from senior Advocates was a later development. Between the years 1538 and 1605 only one third of the Bench was appointed from the Bar.

Sir Thomas Hope who admitted in 1605 also practised for over 40 years and for 17 years as Lord Advocate. ~~On~~ in his Lord Advocates of Scotland¹⁰ observed that he "was not only a great statesman, but a very great lawyer. He had an immense practice at the Bar and in accordance with the custom of his profession, invested his gains in the purchase of land... Three of his sons were on the Bench... There is a vague tradition that when pleading before his sons Sir Thomas used to remain covered and from this circumstance Lord Advocates acquired the privilege of pleading with their hats on. It is more probable that the Lord Advocates' privilege of wearing his hat in Court originated from the fact that as an Officer of State he sat covered in the Parliament House and therefore claimed the right to appear covered before the Judges in the Tolbooth".¹¹

The position of the Lord Advocate who combines the roles of political and legal functions with those of public prosecutor must be noted properly at a later stage. The Lord Advocate was nominated one of the Judges on the Institution of the College of Justice, but Sir John Nisbet of Dirleton was the last person to combine the office of Lord Advocate and of Senator of the College of Justice. He was appointed in 1664. The Lord Advocate still sits on a special seat within the Bar, though the Dean of Faculty takes precedence of

10. Vol. 1. p. 145.

11. cf. R.P.C. 2nd series i, p. 303, vii p.163-6.

the Lord Advocate in domestic Faculty matters. The offices of Dean and Lord Advocate have been held by one person concurrently, but this is a situation unlikely to recur. The institution of the office of Dean of Faculty, first recorded in 1582, assisted greatly in developing a corporate sense in the Faculty. As with the general framework of the College of Justice, the Precedent for this office was presumably the Parlement of Paris. It is not certain when the special costume worn there was adopted in France.¹²

The original dress worn by Advocates before the Faculty became a separate corporation was a green gown or 'tunikil' but this seems to have gone out of use at an early date. Only in 1609 was a definite system of legal dress fixed for Judges and Advocates. Significantly, no discrimination was made between Advocates and Writers to the Signet, who as with the Clerks of Court, were to wear a black gown with a dark or better black lining of stuff or fur. This dress was prescribed by James VI¹³. The symbol of the Advocate's gown or robe as a mark of office and prestige seems to have become firmly established. In 1649, John Maxwell who had 'bought pleas', a practice condemned in all Civilian Systems, was deprived of office by the Lords of Council and Session. The Acts of Sederunt for for the 21st December recorded that they ordered 'the said John Maxwell to be extrudit forth of the House and declared incapable ever hereafter to plead before their lordships in Signe and Token w hereof that a Maisser (Macer) should be commendit to rent his Gown in sunder and pull it over his shoulders in presence of the said Lords and the Haill Advocates, their

12. W.N. Hargreaves Maudsley, Legal Dress in Europe, p. 95 et seq.

13. A.P.S. viii, pp. 612-614: Bell's Dictionary & Digest of the Law of Scotland, 7th ed. Ed. Watson, tit. 'Robes'.

Servants and Agents, to be called in of Purpose to behold the same'.

The ceremony was thrown open to the public as well as to the Advocates though the public were not normally then admitted to hear cases. The Lord Chancellor of Scotland at the same time exhorted and admonished 'the Advocates and others to be circumspect in their Carriage and Dealings with the Leidges'. It would seem that the Judges wished to make a public example of one who appeared guilty of unprofessional conduct, of which considered themselves arbiters, and that the assembling of the Faculty was intended to give a general warning by a particular condemnation. The extract also seems to show that the Writers and Servants or Servitors (devils or clerks) to Advocates were part of the professional group involved.

Omond¹⁴ has little good to say of the lawyers of Scotland at the Restoration. 'Lawyers and politicians they are all dull, cruel, avaricious, ruffians, they are continually drunk both at the Council Chamber and at home'. Relations between Bench and Bar were apparently most unhappy, the Bench seeking to enforce its will on the Advocates and the latter asserting their independence in an arrogant manner. Advocates apparently came to court long after the official hour, they exacted exorbitant fees, prolonged their speeches to increase their emoluments and treated the judges rudely.¹⁵ In 1670, as a result of the report of a Royal Commission, maximum fees according to the rank of an Advocate's client were prescribed. At first the Advocates refused to accept this situation and for two months refused to plead.¹⁶ The Advocates also resented the fact that noblemen asserted the right to enter the Court of Session, which was otherwise closed against the public when they were

14. Lord Advocates of Scotland, Vol. 1, p. 70

15. Fountainhall Historical Notes, passim.

16. Omond, op. cit. pp. 195-6.

pleading. This led to remonstrances between Faculty and Bench and to armed uproar between the Advocates' servants (who may have included 'devils') and the 'lackeys' of the nobles.¹⁷ The attitude of the Advocates at this time indicates true corporate spirit and the preparedness to assert their privileges in contest with the most powerful men in the land. In 1674-5, a substantial and influential element were even prepared for a time to secede from the Courts or accept banishment as a gesture of professional protest and solidarity when Charles II, at the request of the Scottish judges, prohibited appeals from the Court of Session to the Scots Parliament. Among the ultimate consequences of this action were the reassertion in the Claim of Right 1689 of the right to appeal to Parliament and in the invocation of the jurisdiction of the British House of Lords after the Union.

The 'Seccession of the Advocates' led by Lockhart, Mackenzie and Cunningham was connected with the maladministration of justice in the Court of Session itself after Lord President Stair had called a cause out of order to oblige Lauderdale. Under Charles II, there is evidence of Advocates corrupting or attempting to corrupt the Bench¹⁸ and an Act. of Sederunt was passed against 'soliciting the Lords'.¹⁹ There were no notable scandals such as involved Bacon and Macclesfield in England, but modern standards of professional integrity had not been achieved. A.D. Gibb²⁰ has discussed the extent of judicial corruption. It seems probable each judge has what was called a 'peat' or 'pate' being a member of the Bar who was able to influence his patron, the judge - direct approach being apparently deemed too indecent. It is impossible

17. Fountainhall, *ii passim*, esp. pp. 632, 621.

18. A.D. Gibb, Judicial Corruption in the United Kingdom, p. 56

19. Fountainhall, *I* p. 248.

20. Law from over the Border, p. 11.

now to discern how far corrupt judges were moved by love of gain and how much by political and social interest. It seems probable that the former was comparatively unimportant if indeed it played any part at all, and Lord President Gilmour's contemptuous denunciation of the Cromwellian judges as "a wheen kinless loons" goes to support this view. In another place²¹ Gibb comments 'Scotland was a small country, the aristocracy a small minority, and the administration of the law almost exclusively in their hands. The powerful families, therefore, deemed nothing more natural than that their kith and kin upon the Bench - no kinless loons like the Cromwellian Judges - should favour their relatives wherever an issue arose which involved one of them. It was not until 1762 that recruitment to the Bench of the Court of Session had been exclusively from the Faculty of Advocates, and among the most venial judges of the seventeenth century were no doubt some of the Extraordinary Lords, nominees of the King, who could sit or not as they pleased, were not required to have any legal training and received no official emoluments. The former right of lay peers to vote in the British House of Lords' appeals provides a basis of comparison.

Whatever the faults of individual Advocates at the Restoration, their general manners were probably characteristic of most men of their privileged class at that time. Those most venial and cruel were not so much the body of Advocates as such as those who aspired to office. At a time when defence by Counsel in cases of treason or felony was forbidden in England, Advocates in Scotland did defend those accused of political or other grave crimes. From 1672, when the Justiciary Court was founded, probably dated the Scottish tradition of free legal aid in criminal matters²². The Faculty image gained consequently

21. Judicial Corruption in the United Kingdom, p. 63.

22. See Graham v Cuthbert 1951 J.C. 25 per LJ-G Cooper at p. 30

in prestige both internally and in the eyes of influential groups. A fee of 500 marks was required by the Faculty of every intrant Advocate in this period²³ and the Faculty also gained substantial control over entrance examinations. In 1650 Sir George Mackenzie secured the founding of the Advocates' library equipped with the leading treatises from the Continent of Europe. This collection, like the institutional works written by Stair and McKenzie at the time shows that the law of Scotland on paper, as in the legal background of the leading Advocates, was European and cosmopolitan, whatever defects there may have been in the administration of justice in the country. The Library of the Faculty of Advocates was to serve as the one national library of the country until 1925 when the National Library of Scotland was established largely on the old foundations and leaving to the Faculty of Advocates control over the legal material. Amid the political and religious controversies of the seventeenth century a strong sense of unity within the Faculty itself gave it strength and authority. Members of the groups took care for each other. Thus, Mackenzie, known to the frequenters of conventicles as the 'Bluidy Advocate' seems to have warned Stair (a Presbyterian and sympathiser of the House of Orange) to flee before action could be taken against him, for a political offence. Mackenzie also connived at another advocate, Stewarts, hiding in London despite his political opposition to James VII's policies which could have grounded a prosecution. Solidarity was again demonstrated after the 1688 Revolution²⁴. The Faculty asserted in the Claim of Right 1689 the right to appeal to Parliament from the Court of Session. In 1702, the Faculty, or at all events the Dean in their name, submitted an address to Parliament concerning the meeting of Parliament and other public matters, and in fact protesting against the Convening of Parliament after the death of

23. Fountainhall ii, p. 698

24. Smith, British Justice: The Scottish Contribution, p. 59

William III. The Estates considered that the Faculty merited punishment for acting "extrinsic to their ordinary administration", but the fact that they so acted is in itself significant. No punishment was ever imposed.²⁵ Here was a small professional group which contended that not more than four new intrants should be admitted each year and yet spoke with authority and impunity to the Estates. The last Scottish Parliament assembled in May, 1703, and was dissolved just before the Union of 1st May, 1707. In it the Lord Advocate sat ex officio as did the Judges. Members of the Bar had taken an active and influential part in the work of the Scottish Parliament and it had developed vigorously from 1688. The Union was destined to change radically the Scottish Advocate's role in politics.

Though apparently it had been necessary in 1675 to insist that Advocates should wear their gowns in Court, the traditional costume had on the whole remained in use. In the drawing of the funeral procession in 1681 of the Duke of Rothes, Lord High Chancellor of Scotland, though the Advocates' dress is in general that laid down by James VI, there is some deviation between that worn by the Advocates and that of the Writers to the Signet. The Advocates' gowns have braiding and tassels which are not on the Writers' gowns.²⁶ The whole Bar wore bands and full bottom wigs, the wig, of course, being part of a gentleman's dress at that time. The only body in the procession which seems to have worn plain stuff gowns like those now worn by Advocates are the University professors.²⁷ It appears²⁸ that between 1587 and 1604 a distinction had been made between Advocates for the Inner House and Advocates for the Outer House 'which after it had gone into desuetude was attempted to be got

25. Omond, op.cit. pp. 265-7

26. Hargreaves Mandelsley, History of Legal Dress p. 97

27. Bell Dictionary, tit. Robes

28. Forbes Preface, p. 7

renewed in the year 1670, but the project being very offensive and disobliging to the Bar, the promoters thereof thought fit to drop it'. Thus until quite modern times, the functions and status of all Advocates remained equal.

The 18th and 19th Centuries

The information available on the Faculty of Advocates of use to the social anthropologist is much more satisfactory in the eighteenth and early nineteenth centuries than in earlier times. Indeed Boswell, Walter Scott, Cockburn and Stevenson have presented well known images which, though distorted occasionally in detail, are, on the whole, reliable and vivid. Cockburn has no real successor and later Scottish legal biographies such as those of Lords Inglis, Ardwall and Salvesen and the auto-biographical Man of Law's Tale by Lord Macmillan, are infinitely less revealing as secondary sources than the writings of an earlier era. Fortunately, field work can take over when source material dries up. The Union of 1707 had immediate and also long term consequences for the Faculty. The Agreement itself safeguarded in terms a number of the vested interests of the ruling classes in Scotland, the law, the church, the royal burghs and the heritable jurisdictions. Yet it became clear very soon that extensive anglicisation of Scottish institutions would succeed, partly through English policy and partly through the sycophancy, ambition and connivance of the self-interested sect. The effect of the Union on Scots Law as such was immediately apparent in limited areas, due to statutory innovation such as the Treason Act, 1708, and in Civil cases when Scottish litigants invoked the ultimate court of appeal, the House of Lords, in which only English judges sat until the last third of the nineteenth century. In general, however, the

orientation of Scottish private or criminal law remained in the European tradition until the early nineteenth century. The Faculty of Advocates remained and remains proud of its privileges even when it has been prepared increasingly to surrender vital principles of a national yet cosmopolitan jurisprudence under pressure of the more powerful economic and political influences of England. Advocates, though few in number, took a leading part in the cultural and intellectual life of the country, and the Golden Age of Edinburgh owed much to them.

Unlike the Scots involved in British affairs - which were controlled from London through the Palace, Parliament and various Government Departments - the Scots who spent their lives in the Faculty and in the College of Justice in Edinburgh became somewhat out of touch with London interests and attitudes. The other remaining specifically Scottish institution, the Church, was riven by sectarian disputes, while the gentry remained Roman Catholic or drifted to Anglicanism. The great extension of British rule overseas followed the Union and paradoxically fostered the world wide proliferation of English law. The Scottish Bar remained essentially Scottish. Those non Scots who sought entry to the Faculty were from Mauritius or Cape Colony where French or Dutch Romanistic systems had survived British occupation. In most countries, lawyers take a leading part in the political life of the central legislature. Scotland proved the exception. It was almost impossible to be both an active advocate and a Member of Parliament due to the factors of distance and the existence of different legal systems in Scotland and England. On the other hand, the Lord Advocate's office became far more influential after the Union than it had been before, when it had been only one of the Offices of State. After the

abolition of the office of Scottish Secretary, the Lord Advocate's control of advancement in the profession eventually resulted in excessive political partisanship within the Faculty, for personal rather than for public reasons. This led to intense internal conflicts but not to destruction of corporate spirit nor of the public image.

A full description of the organisation of the functioning of the Court of Session and of the Faculty of Advocates in the immediate post-Union period is contained in the preface to Forbes' Decisions. Of the Faculty, he writes "the whole society goes under the name of the Faculty of Advocates, a very honourable body into which none are admitted but such gentlemen as have spent several years in the study of the laws, though many of good estates commence as Advocates with no other view than the honour of being members of it". Examination was in the control of the Faculty who appointed examiners and balloted on the intrants' performance. Thereafter, if successful, the intrant had allocated to him a text from the Civil Law and on an appointed day "was allowed to stand in one of the Lord's places covered when he makes his harang". Advocates, Forbes noticed, were "sometimes though rarely admitted by trial on Scots Law, in which case the candidate has no speech to the Lords before admission, but admission upon a trial in the Civil Law is more honourable". Not until 1750 were Advocates required to pass an examination in Scots Law. By Act of Sederunt, 28th February, 1750, the Court of Session on the representation of the Faculty enacted that examination in Scots Law should be necessary but that this should be preceded by examination in Civil Law one year earlier. No-one under the age of 20 was eligible for the examination in Civil Law. After success in both examinations an intrant completed his qualification as before by public trial and thesis in the Civil Law. On 17th November, 1866, the Faculty itself laid down regulations as to entrance which correspond in general

to those which apply today, that is to say, an intransigent is examined in general scholarship and in law, or more usually offers proof of having taken a first degree in Arts at a University followed by a degree in Law. The tradition of European study in France and the Netherlands continued until the time of the Napoleonic Wars, though it fell off considerably towards the end of the eighteenth century, due in large measure to the emergence of a number of effective law teachers in Scotland, such as Erskine, Bell and Hume in Edinburgh and Millar in Glasgow.

When the College of Justice was inaugurated, it had been installed in the Tolbooth, but in 1632, Charles I had ordered a new building for the Scottish Parliament and for the Lords of Session. Occupation was deferred for some years due to Civil War and the Usurpation. Nevertheless, from 1661 the Lords had sat customarily in the Parliament House and from the Union they sat on there. There was something of the symbolic in this arrangement. Though the other organs of Government had their seat in London, the College of Justice continued to occupy the Parliament House. In the Inner House, the Judges sat at a semi-circular bench served by 6 Principal Clerks, and at one corner, a Judge attended to Bill procedure. In the Outer House, or Great Hall in 1741, there was one side bar,²⁹ and a raised fore bar which the Advocates reached by climbing some steps as their cases were called. The public had access to the hall and their noise disturbed the pleaders until new courts were constructed in the building, a development which was made particularly necessary when the Court of Session was reorganised in the early nineteenth century.

29. In South Africa, 'the Sidebar' refers to Solicitors or Attorneys as distinguished from the Bar, the advocates.

Until the early nineteenth century there were a number of central courts which are now absorbed in the Court of Session, or the High Court of Justiciary, which were always the most important.

In the eighteenth century specialisation in function between Advocates and others engaged in legal business became clearly defined. The notary was restricted to part of the chamber practice of a modern solicitor, while the function of the modern solicitor in litigation before the Supreme Courts was shed by Advocates. Originally, Advocates had themselves acted as agents but afterwards, handed over the practice of solicitors to others including the servitors or first clerks.³⁰ In 1718, Spottiswoode³¹ states 'Generally speaking every advocate has two servants, one who takes care of his client's affairs and the other who waits on his person'. In this way the Advocate's role was kept clean. He did not discuss business but offered a specialised professional service. He did not, however, specialise as in England regarding the type of case he would take in the higher Courts, and would accept criminal and civil work of all kinds. The expression 'clerk' or 'servitor' has acquired in modern use a meaning of somewhat inferior status. The designation 'clerk' in Scots Law has often implied substantial status, as with the Lord Justice Clerk, Lord Clerk Register and Principal Clerk of Session, the last of which offices Walter Scott was pleased to hold. Clearly as far as social distance is concerned, Boswell did not regard it as at all unusual that his clerk, (first clerk) should be of the company invited to dinner.³² He, it will be recalled, was sufficiently conscious of social distance within the profession as to question

30. Advocate General v. Moncrieff (1848) 10D 987 at p. 989

31. Forms of Process p. 50

32. Boswell: The Ominous Years 1774-76 (ed. Rykman and Pottle)

whether judges should be so free with advocates by roistering out of court in taverns.

At some period in the mid eighteenth century interlopers seem to have taken it upon themselves to act as solicitors as appears from the Act of Sederunt, 10th August, 1754, which narrates that 'several persons who are not members of the College of Justice have taken it upon themselves without any warrenty or authority from this Court and without any trial or admission to manage agent and solicit causes'. The right so to act was restricted to Advocates' First Clerks, Writers to the Signet (who for the first time were given official sanction to act as agents) and others admitted by the Court under regulations to be made. The Act of Sederunt of 10th March, 1772, was to the same effect and the Faculty itself drew up regulations to ensure that First Clerks should be properly qualified. In 1774, a charter was given to the Society of Solicitors before the Supreme Court (S.S.C.) and in 1850, the Advocates' First Clerks were merged in this Society³³.

Mr. Nicholas Philipson³⁴ in the course of research as yet unpublished, has from a historian's point of view examined the social structure of the Faculty of Advocates from the Union until 1850. He concludes that the key to the problem of how the Union was made to work in Scotland and the way in which the administration was carried on despite ultimate control from London is to be found in the structure of the Faculty of Advocates. He observes 'the pool from which the native administrative talent for such a successful administration could be drawn, lay in the Faculty of Advocates' for a legal career by definition based the person concerned in Scotland. It may be

33. See Mackay, Practice of the Court of Session i.p. 120. cf. Advocate General v. Moncrieff (1848) 10 D 987.

34. The present writer is much indebted to him for valuable information which she acknowledges gratefully.

recalled that between 1725 and 1926 (except for 5 years in the mid eighteenth century) there had been no Secretary of State responsible as such for Scottish affairs. The Lord Advocate was not only the public prosecutor and legal adviser to the Government but was also made generally responsible for Scottish affairs. Moreover, the Lord Advocate's powers of patronage were immense - Scotland's 'manager', Dundas, being the classic example. He achieved his position through membership of the Faculty of Advocates and largely from that same body made his control effective. The Faculty was small in size and it was a social 'élite'. The social status of the members of the Faculty changed strikingly during the period covered by Mr. Philipson's research, and his conclusions tend to complement certain provisional conclusions which the present writer had reached regarding the anglicisation of the Scottish middle class from about the mid nineteenth century. It is from that period too that T.B. Smith in his Studies Critical and Comparative, traces a jurisprudential decline in the confidence of the Scottish Bench and Bar in principles of their native jurisprudence and an increasing tendency to anglicise the content of Scots Law.

The Social Structure of the Faculty of Advocates

Philipson's research on the structure of the Faculty from the Union of 1707 to 1850 discloses how closely it reflects the state of political power in Scotland during that time. At its beginning, only 4.5% of intrants were born of fathers who were not landed proprietors. However, in the last quadrⁱennium this element represented 59.75%. After the Napoleonic Wars, recruitment from the unlanded classes rose continually. One factor of course

in this striking change in the composition of the Faculty was the rise of the middle class, but of equal or even greater significance is the altered representation of the various landed interests. In the first quinquennium, a third of the 48 intrants were sons of peers and baronets, while in the final quinquennium, when the intake was 46, none of this class was admitted. Philipson concludes that after the '45 Rising, the 'upper' Scottish gentry and the landed class of medium importance, both gravitated towards London. With the exception of the law, lucrative patronage lay to the South, and legal success was usually governed by the lawyer's relation to the Government in London. Prior to the First Reform Act, 1832, especially during the era of Henry Dundas, patronage was a factor of tremendous importance. In Scotland, the county constituencies corresponded to some extent to the 'Rotten Boroughs' in England. Voting was restricted in the Scottish Counties to the 'King's freeholders', a very small group. The Faculty of Advocates was already concerned with land law as a source of voting rights. Cockburn in his life of Lord Jeffrey³⁵ observed that 'There were probably not above 1500 or 2000 county electors in all Scotland, a body not too large to be held, hope included, in the Government's hand.' Control of these constituencies through patronage was the major object of successive administrations. The influencing of the landed men especially of the great families was important, though Dundas himself preferred to influence individuals.

It would appear that over the century and a half covered by the Philipson's research, though the proportions as well as the contributions made by the classes of greater and lesser gentry to the Faculty change notably, the 'minor' gentry

35. I, p. 75

(the third in importance of landed men) remain a constant force within the Faculty. Their lack of wealth and influence based them for a much longer period in Scotland, and the Faculty of Advocates offered the one satisfying career for a Scotsman of talent in his own country. The great men went South drawn by the magnet of political power, and became in effect Britons, southern English in their interests but with estates in Scotland which gave them influence and prestige. Men of family but of less fortune, unless they elected to practise at the Bar in Edinburgh, were also increasingly drained from Scotland. The Armed Forces and the East India Company, where promotion depended on patronage, in particular provided occupation and opportunity for the ambitious Scot in the fifteenth century. His successors in the nineteenth and twentieth centuries were recruited by the I.C.S. or Colonial Service. To the general drift South of talent and wealth, the Faculty provided at least a check. One thing which has been very apparent before and since the Union is that the Faculty has valued its separateness, and will never willingly accept its absorption in a 'British' legal profession. The Faculty has essentially been a national profession except for a very few from Mauritius, South Africa and Malawi and these have normally had Scottish connections. Cockburn in the mid nineteenth century, reviewing the scene from the late eighteenth century, often returns to the theme³⁶ 'the legal profession in Scotland had every recommendation to a person resolved, or compelled, to remain in this country. It had not the large fields open to the practitioner in England, nor the practical seat in the House of Commons, nor the lofty political and judicial eminences, nor the great fortunes.

36. Life of Lord Jeffrey, i pp. 84-5

But it was not a less honourable or a less intellectual life. It is the highest profession that the country knows; its emoluments and prizes are not inadequate to the wants and habits of the upper classes; it has always been adorned by men of ability and learning who are honoured by the greatest public confidence'. The cultural gifts of the members of Faculty were particularly apparent in the period of which Cockburn writes. This tradition has survived, but not as a general characteristic of Advocates as a whole.

It may be recalled that Edinburgh's Golden Age, including its Indian summer ~~is~~ covered by the personal experience of Cockburn and the generation by which he was reared. Hume, Adam Smith, Robertson, and others lived in memory as great figures. The leader of the scientific Whigs, many of whom were Advocates, was Lord Kames, a judge. One of his disciples, John Millar of Glasgow, an Advocate and law professor, had an enormous influence on the education of British statesmen including Melbourne. Only after the Tory reaction at the time of the Napoleonic Wars did Oxbridge assume nursery duties for British politicians. The leading figures of the Golden Age largely inspired by Kames included speculation on law in their very wide interests, and Adam Smith came to be cited almost as a legal authority in court. It was characteristic of men like Kames that their zeal for law included Social Anthropology, Comparative Jurisprudence, and Economics. Profoundly interested in the historical approach, they also were champions of reform of the law. The intellectual vigour of the Scottish lawyers has probably never been greater than in the eighteenth century, and in a sense, they formed and led the life of the country. In George Washington's library at Mount Vernon, there is still exhibited Kames' treatise, The Gentleman Farmer, written in his 80th year, after 30 years of duty spent on the Bench, and much longer as a legal author.³⁷

37. See generally P. Stein, *Legal Thought in eighteenth century Scotland* (1957) Jus. Rev. and W.C. Lehmann, John Millar of Glasgow

Yet Cockburn notes³⁸ in 1853 with regret and a degree of fatalism that the century that is passing away has every chance of leaving Scotland but an English county. I feel my own indignation often roused. But though particular examples may justify this, it is useless and wrong to resist the general current. 'Old Scotland', he concluded, 'can live only in the character of the people, in its native literature and in its picturesque and delightful language' which, he noted was disappearing. Cockburn in the mid nineteenth century was already recognising the increasing anglicisation of the urban middle class: and as has been noted this element was becoming increasingly represented in the Faculty of Advocates. Subsequent to the period covered by Philipson and Cockburn, the trend of anglicisation extended to a much wider section of the middle class, though the process is continuous and its effects in varying degrees are apparent from the mid eighteenth century. Boswell is indeed an example and a prototype. The desire to master southern English speech has probably characterised many in the various generations of advocates since his time. When Jeffrey went up to Oxford in 1792 he commented:³⁹ the only part of a Scotsman I mean to abandon is the language, and language is all I expect to learn in England. The result Lord Holland remarked was that 'though Jeffrey had lost the broad Scotch at Oxford, he had gained only the narrow English! Of many could the same have been said over the past two centuries.

Yet Boswell and others of his outlook were passionately attached to their landed estates in Scotland and to their family interests. In this respect they were Scottish in outlook though looking to London for social and intell-

38. Journal II pp. 295-6

39. See Cockburn, Life of Lord Jeffrey, I, pp. 46-7.

ectual stimulus. Boswell was almost obsessed by the idea that Auchinleck must pass in the male line, whatever sacrifices this might involve for his daughters whom he adored. Advocates who came from unlanded families put the seal on a successful career by acquiring small estates. Thus, Robert MacQueen who became Lord Justice Clerk Braxfield was the grandson of a gardener, son of a writer (legal) but had made a substantial fortune at the Bar which he spent on an estate. To this day, Monday is not a Court day in the Court of Session, because in past times the Advocates and Judges required this day to look to their estates. Moreover, when a Senator is raised to the Bench, he takes his seat with a judicial title which may be that of his estate. This happens less frequently today than formerly, and indeed Cockburn condemned the practice, as long ago as 1850⁴⁰ since 'good lawyers' by this time were no longer landed men. At all events, the element of minor gentry which maintains its influence in the Faculty today, though less so than in the nineteenth century, is recruited now as then from those whose fathers were not landed, and whose estates have probably changed hands quite frequently in the present century. The position of the minor gentry in the Faculty probably remained constant throughout the remainder of the eighteenth and nineteenth centuries. Its influence today is probably less due to numerical factors than to personalities which, of course, have always been important in Faculty affairs.

At the present time a high proportion of Advocates are the sons of lawyers. During the century and a half covered by Philipson's research, 29% of those admitted to the Faculty were from legal families. He designates as dynasties, families in which over three or more generations from father to son provided

40. Journal ii, p. 260; see also P.G.B. McNeil 'Judicial Titles in Scotland; 1964 S.L.T. (News) 125 in which he exposes the artificiality of the use by unlanded men of territorial designations. This practice developed in the nineteenth century when judges were no longer mainly recruited from the laird class.

lawyers including at least one intrant to the Faculty. He also includes some exceptional cases where one generation had not produced a lawyer. It was found that the greater gentry produced nine dynasties, the lesser gentry 31, minor gentry 16 and the non-landed 10. However, "the 9 dynasties of the greater gentry produced 58 Advocates ($6\frac{1}{2}$ per family) and 27 Judges (or 2 per family) including 4 Lord Presidents. The dynasties of the lesser gentry produced 142 Advocates (or $4\frac{1}{2}$ per family), 39 Judges (1 per family) including 4 Lord Presidents. The 16 dynasties from the minor gentry produced 41 Advocates (or $2\frac{1}{2}$ per family), 13 Judges (or 4-5 per family) and the unlanded produced 24 Advocates ($2\frac{1}{2}$ per family) and 4 Judges ($2/5$ per family).

By 1800 however, the dynasties have declined. Only 4 of those from the greater gentry survived and 16 from the lesser. The same period, however, saw the dynasties of the 'minor', i.e. medium, gentry reach its peak from which there was subsequently a decline. The non-landed element had not established dynasties at the turn of the century but reached its peak of 10 in 1830, a figure which remained constant until 1860 at least. The last emergence of such dynasties is in itself significant. Writing of Robert Forsyth who had admitted in the late eighteenth century, Cockburn commented⁴¹ 'The Faculty of Advocates which was then a highly aristocratic body and used to curl up its nose at every plebeian who tried to enter, objected to his admission'. Forsyth was eventually admitted, but to this day the formality is observed of balloting on entrance after public examination. Professional and intellectual competence have not guaranteed admission as a right. Moreover, toughness of moral fibre has been required of each successive social group to gain acceptance into the Faculty.

41. Journal, ii, p. 153.

Until the time of Dundas, the 'establishment' of the Parliament House, its established legal aristocracy, controlled preferment in the profession. As Advocates, however, became more dependent on fees and less on their own private fortunes, they were inclined to look more to political influence for preferment, a situation which still survives in large measure. Before Dundas, however, preferment especially to the highest offices was a dynastic matter. During the century from the Revolution to 1787 with short interruptions, the Lord Presidents were appointed from the houses either of Dalrymple or Dundas of Arniston, and until 1831, nomination to that office still lay in the gift of Robert and his son, Henry Dundas.

Chapter 4

THE FACULTY OF ADVOCATES TODAY

In its organisation and function the Faculty of Advocates would appear to be unlike other professions and indeed differs in a marked way from the legal professions in other countries. Though there is in Scotland as in England a division between the Bar and the solicitors' branch of the profession, as will be shown the life of an advocate is unlike that of the barrister, except that both have the right of audience in the highest courts.

Professional Life of an Advocate

Intrants are now admitted after examinations which proceed upon a remit from the Court following upon a petition presented by the intrant.¹ Nine members of the Faculty are appointed annually to act as examiners, a function which in modern times seems mainly concerned with formalities. Intrants must satisfy the examiners in the 'private examinations', which are written, of their qualifications in law and general scholarship. In practice, though the Faculty will itself set examinations, the great majority of intrants are exempted from such examinations by proving that they hold an Arts degree and a Law degree from a Scottish University comprising certain prescribed subjects. After the intrant has passed three 'private examinations', the Dean assigns to him for his public 'examination' a title from the Pandects or Digest of Justinian; and the intrant has to write a short thesis on this title in latin.

1. Encyclopaedia of the Laws of Scotland, Vol. 1, pp. 173-4

In fact, however, most intrants are permitted to rely extensively on theses written by advocates in past times when a knowledge of latin and Roman Law was more extensive than is customary with the present generation. The candidate must, however, formulate three propositions which he is prepared to 'defend', and if the thesis (as almost invariably happens) is marked 'impugnetur' the public examination takes place. As a condition of admission, however, the intrant must satisfy the Dean that during the year immediately preceding he has not been engaged in any trade, business or profession either on his own account or in the employment of another. He may, however, have been pupil or devil to a member of Faculty. This rule which has been enforced for a long time seems designed to ensure that Advocates shall be set apart from commercial money-making activities and also from too close connection with solicitors who might send work to a former associate. An advocate must also pay on or before admission the sum of approximately £450, of which £300, represents entry money and £80 goes to the Advocates' Widows (or Widowers) Fund to which by virtue of a Private Act of George IV each member of Faculty must also contribute annually. It is apparent that the requirement to produce so large a sum on admission to a profession which at least hitherto has been notoriously badly remunerated at the outset is bound to operate in favour of the wealthier classes and to discourage those of modest means. Since, however, the relationship between master and pupil or devil is gratuitous in Scotland (unlike England) and an advocate does not have the heavy expense of chambers in an Inn like his English counterpart, the cost of the first few years of an advocate's career is now undoubtedly less than that of an English barrister.

Before admission an intrant has usually spent a year as pupil to an experienced junior advocate. This is generally (though incorrectly in Scotland) described as 'devilling'. The pupil attends his master's consultations, sees his papers and tries his prentice hand in drafting summonses, opinions, notes and the like for his master. A close personal relationship is usually established in this way that lasts for their lives, and advocates among themselves like to trace their 'genealogies' through the masters who have taught them and those who taught their masters.

The 'public examination' which directly precedes admission as advocate, as a rite de passage is attended with considerable formality. The intrant appears in 'tails' and white bow tie but with a black waistcoat. He is conducted before the assembled Faculty (or such as choose to attend) and there 'defends' his thesis orally and in latin against the challenges of three members of Faculty. (In fact the questions and answers have been pre-arranged.) The candidate then withdraws and the question of admission is decided by the Faculty voting by secret ballot. In modern times no one has been rejected after passing the examinations though within living memory an unconfirmed report suggests that a small group contemplated using their powers to exclude intrants of whose race or religion they disapproved. (It may be recalled that the Faculty is almost exclusively a profession of Scotsmen. There has recently been admitted one African intrant from Malawi, who had connection with Scotland through the Church in his own country. Everything possible was done to help his entry). After admission, the new intrant or intrants are conducted in procession before the Lord Ordinary to take the oath of allegiance in open Court. Thereafter the Dean of Faculty introduces the newly admitted advocate to the Lord Justice-General, and he is then welcomed by his professional brethren.

From the day of admission he is the professional equal in status if not in knowledge of all other advocates. He will address them by surname (or by given name if he knows them well) out of Court and never by a style such as 'Mr.', 'Sir' or 'Lord'. In Court such styles are used - but not designation such as 'professor' or 'doctor'. Another symbol of equality within the profession and its distance from others appears from the convention that advocates do not shake hands with each other at social or professional meetings - though at a consultation attended by several advocates they will greet and take leave of lay clients or solicitors in this way.

On admission an advocate becomes a member of a community which has remarkable professional solidarity, though, since partnerships are not permitted, each member of the community is in competition with the others for the limited work available and for eventual promotion to the highest offices in the profession including the Bench. Even out of Court the community of advocates is largely maintained. Each advocate must have a dwelling place or accommodation address within one mile of the Parliament House, which in modern practice means the New Town of Edinburgh. Though since the Second World War there has been a growing practice for advocates to acquire chambers or an accommodation address in this area but to live out of it, the older tradition still largely continues that advocates (60-65%) actually have their houses there and form an identifiable element in the community. Indeed they are themselves a community in which professional and private life is interlocked. This has many practical advantages. Consultation can be held with solicitors and lay clients after Court hours; solicitors can deliver papers in the evening knowing that counsel can work on them at home on the night of delivery; the Juridical Library in Charlotte Square (open at night) is close at hand; the bagman who delivers and collects the traditional bags contained advocates' papers drives the 'Faculty taxi' round

this relatively small part of the town. This is the traditional way of conveying briefs and other legal papers to and from the Parliament House, though some of the younger advocates whose work is not substantial do not use this service which has to be paid for specially.

At the English bar, barristers' papers are conveyed in red or blue cloth bags, the 'red bag' being awarded to a junior by his leader in recognition of some outstanding work in a leading case. (Recently the English bar has restricted the excessive use of this type of recognition which had resulted in some inflation of the status currency.) The Scottish advocate's bag is a capacious repository of leather and canvas or cloth carrying a small metal plate or leather label inscribed with the owner's name. These bags are placed on long shelves in the corridor outside the Division Court rooms. In the evening an advocate's papers are placed in his bag by his clerk or by one of the bagmen, and the latter take the bags each evening by taxi or motor car to the New Town, proceeding from door to door in the 'Quarter'. In the morning they collect them from the advocates' homes and take them up to the corridor in Parliament House.

More or less immediately above his bag an advocate has his 'box' on a higher shelf. This is of wood, about two feet long, one foot deep and a foot wide. On the front is a brass plate bearing the owner's name. These boxes containing any legal papers on which the advocate is not actually working at the time stand open during Court hours. It has occasioned surprise to those not brought up with the system that the most confidential papers may be exposed in this way. Etiquette in the profession virtually excludes the possibility that an advocate or solicitor should look at papers in another

advocate's box unless he were (in the case of a brother advocate) appearing for the same parties. In such an event one advocate might look at the relevant papers in another's box but at no other whatsoever. There is mutual confidence in the complete professional integrity of all who practice at the Parliament House.

On the outside of the advocate's house (or chambers) he is expected to affix a brass plate with the simple legend Mr. A.B., Advocate. This plate will be polished and exhibited with pride so long as the advocate is in practice. The legend will not be altered to include any honours or academic distinctions, though one - and only one - advocate who had taken a Ph.D., degree elected to designate himself Dr. X.Y., Advocate - thereby acquiring the sobriquet 'The Doctor', with somewhat satirical overtones. Advertising or touting for business is strictly forbidden by the Faculty. Only by his plate and by his designation as 'advocate' in the legal directories and telephone directory can a member of Faculty make known that his services are available.

The uniform of an advocate out of Court is also worn by a few solicitors but is, on the whole, sufficiently distinctive in modern Edinburgh as to make it possible to identify a man as an advocate on his way to or from Court or in the University Staff Club after he has taken a tutorial on a part time basis. At the time of the General Assembly or of a Royal visit to Edinburgh a few judges and members of Faculty still walk up to Court in morning dress with silk hat and umbrella. This was, of course, the standard costume prior to the first World War. Today the standard costume is short

black jacket, striped trousers, and a bowler or black homburg hat - with umbrella. Since the advocate in Court wears a wing collar, with white tie (or, if a silk, with fold of white linen) he will often go to and from court with this type of collar worn with a bow tie or dark ordinary tie.

In Court the uniform of an advocate is of great importance. As one of the leading Scottish institutional writers³ has pointed out, an advocate's gown is his mandate. He needs to show no other authority that he is empowered to appear on his client's behalf. Clearly the style of dress for advocates has changed over the centuries to some extent, but the gown has been worn constantly since 1675 - in which year pressure had to be applied to persuade advocates to resume the practice of wearing gowns.⁴ By the end of the eighteenth century the dress of an advocate was a long black gown with black velvet collar, bell sleeves fastened half way up the arm and a short wig. The modern gown is identical with that of an English barrister, being of stuff with bell sleeves and with tucks at the shoulders. Only if an advocate has appeared before the House of Lords does he wear a purse and ribbon on his gown. For this the reason seems to be that before that Court Scottish advocates formerly had to dress like English barristers, and those who did so continued to wear in Edinburgh what was in effect a mark of distinction, signifying that they had appeared in the highest civil court. Similarly juniors in the House of Lords had to wear bands like English barristers, but since the Second World War advocates have regained the right to wear the white bow tie in London as in Edinburgh.

3. Erskine Institutes 3.3.33.

4. See on this and generally, W.H. Hargreaves-Mawdsley, A History of Legal Dress in Europe, p.97 et seq.

The earliest recorded example of the wig being worn with legal dress is in the portrait of Sir George MacKenzie (King's Advocate 1677-1689). A century later advocates in Edinburgh had bag wigs, though other styles of short wig seem also to have been worn.⁵ It may be suggested that the wig unlike the gown was not in fact part of the advocate's official uniform at that time, but rather the ordinary adornment of a gentleman. At all events Hargreaves-Mawdsley suggests⁶ that through the influence of the French Revolution, after 1790, many advocates gave up wearing wigs. Walter Scott was among those who wore their own hair. However, the bob wig has been a standard article of dress for an advocate in Court since the early nineteenth century - perhaps due to the dressing customs imposed on advocates appearing in the House of Lords. Though the eighteenth century gentleman wore his wig as a mark of elegance and kept it powdered and clean, today too white a wig denotes that an advocate has recently been admitted. Accordingly a dirty grey wig is the badge of age and experience.

Advocates who have not taken silk wear in court an evening tail coat or dinner jacket with silk facings and striped trousers. There has been no tendency, as in England, to accept any generally 'sub-fusc' clothes under the gown. The neck linen worn by advocates has gone through successive changes as the modern form of collar and tie evolved. Bands were abandoned in 1766 and for a time a white folded neck cloth was in use. Today the wing collar and white bow tie are worn by advocates in Court.

The dress of the few women advocates as worn in Court is an adaptation

5. *op. cit.* pp.100-1.

6. *ibid.*

of the male 'uniform' - a severely cut black suit with white blouse. A stiff white collar is not worn with the white tie (or in the case of a Q.C., fold). In 1965 a woman advocate has so far been successful in discarding the white tie as unfeminine, and wearing instead a high necked silk blouse. Wig and gown are as worn by men. The late Lord Justice General Cooper (a bachelor of blameless life) reputedly sought to institute the wearing of black silk stockings by the first woman Q.C. (Sherriff Margaret Kidd). It is said that not even the Pope can control the dress of female religious orders, and the Lord Justice-General of Scotland failed to introduce to the Faculty what was then (if not now) regarded as the linge bas of the Moulin Rouge.

If the costume of the advocate has come to be a formalised version of the eighteenth and nineteenth century dress, the dress of Queen's Counsel conforms more clearly to an earlier eighteenth century pattern. Traditionally the equality of function of all advocates was highly regarded, and there was opposition within the Faculty itself to the idea that some should be given a higher rank than others. The status of King's (Queen's) Counsel was not conferred upon Scottish advocates - except upon the Lord Advocate, Solicitor General and Dean of Faculty - until 1897. At this time members of the Scottish Bar of great seniority and experience were offended by the attitude of English 'silks' who claimed precedence over them in the House of Lords, Privy Council and in Parliamentary Committees where Scottish and English counsel had the right of equal audience. Accordingly in 1897 the Faculty petitioned the Queen to create a roll of Queen's Counsel in Scotland. This was granted. Unlike the practice in England, a Q.C., does not sit 'within the Bar'. This privilege is restricted to the Lord Advocate and the Solicitor General. There is, however, an order

of seating on Counsel's bench according to whether counsel appear for pursuer or defender and in relation to senior or junior counsel. An advocate seeking this rank and dignity of Queen's Counsel must apply to the Crown through the Lord Justice-General and Secretary of State for Scotland. Before sending his formal request by letter to the Lord Justice-General, an applicant must give notice of his intention to all members of Faculty senior to him^{6a} according to date of admission. This acts as a check on premature application; moreover, the Lord Justice-General uses his discretion in considering whether to recommend any particular individual. 'Silk' is probably easier to achieve in Scotland than in England and within the profession itself does perhaps not command the same prestige as in the South. It is rather ironical - in view of the origins of this rank in Scotland - that the press should foster the popular image of an advocate in general as a 'Q.C.'.

Out of Court the uniform of a Queen's Counsel is the same as that of other advocates. In court he wears a silk gown, linen fold (instead of tie) a braided coat which resembles that worn by high ecclesiastics of eighteenth century style and a wig. Usually the short wig is worn, but on very formal occasions and in the House of Lords the bag wig is worn. Etiquette regarding Queen's Counsel in Scotland is largely unwritten and of relatively recent origin due to the historical factors described. Senior counsel cannot appear in a case in Court without a junior; there are, as has been mentioned, conventions as to where senior and junior counsel should sit on counsels' bench - buty they do not (apart from the Law Officers) sit within the Bar as in England.

To the conventions of dress just described, which separate an advocate from others, one exception may be noted. An advocate who is on military service

6a. Who have not yet taken silk.

may appear before the Court in uniform. In Sir Walter Scott's time uniform and gown might both be worn, but this is not the custom of the present century. During the Second World War there was an unprecedented occasion when for the first time an advocate (the present Lord Wheatley) appeared in the uniform of an N.C.O.

The Court Life of the Advocate

In studying most occupations a hard and fast distinction might be made between the official and private aspects of life. So far as the advocate is concerned this cannot easily or appropriately be done, since in most cases his professional life is largely based on his private residence, and his profession in Court brings him in daily contact with a close brotherhood in which he is likely to make his friends and acquaintances or even to find a spouse. (Women are not on the whole successful at the Scottish Bar largely because of the conservatism of the profession, but though the sample group is too small for generalisation, women advocates may tend to marry those of their profession).

In describing the daily round of the advocate it may be appropriate to regard it as beginning at night. As has been mentioned an advocate's papers are brought to his home in the evening by the bagman, and solicitors also deliver urgent work through advocates' letter boxes as the law offices close. Consequently it is not until after dinner that an advocate gets down to work preparing for the next day in Court and clearing incidental paper work and opinions - though these last may to some extent accumulate for the week-ends or vacations. The busy advocate does much of his work at night. In the morning most walk up the Mound before 10 o'clock to the Parliament House which

is the focus of their official lives. If several travel by public transport, etiquette requires the senior to pay. Their principal function is to plead in Court. They may also, however, work in the Library, secluded from all but advocates: they may hold consultations formal or informal with solicitors and lay clients; they will (especially the less employed) spend a considerable amount of time talking at the fires in the Robing Room or in Parliament Hall, or pacing the Hall. Lunch at Parliament House used also to be a pleasant social occasion where groups of friends of varying seniority meet constantly at particular tables which by tacit acceptance become appropriated to these groups. Catering for small numbers is not economic and in recent years standards have sunk to more or less cafeteria level. There are no lunching or dining facilities corresponding to these of the Halls of the Inns of Court in London. But, of course, the social life which a barrister finds in his Inn, the advocate finds in his closely knit community based on the New Town.

At 4 o'clock when the Courts rise, most advocates return home. They may see their wives and children briefly, and the former will be expected to keep the latter happy and silent during the next stage of the day. Consultations with solicitors and lay clients usually take place in the advocate's own home, or, if he is a junior, at that of his senior. In recent years a number of sets of chambers - accommodation addresses for delivery of papers and for consultations have been set up in houses in the New Town. Whether this trend will increase cannot be predicted with confidence. Advocate and wife should be reunited for dinner, after which the advocate returns to his study to work until a late hour.

The advocate's life in Court calls for special consideration, but first the Courts should be described. This may be done most conveniently by adopting with full acknowledgment and adding as an appendix⁷, a summary on which it

258
7. see p. infra

would be difficult for a non lawyer to improve. In his second Hamlyn Lecture 'The Machinery of Justice' (which is published as chapter 2 of British Justice: The Scottish Contribution) Professor T.B. Smith has sought to describe the organisation of the Scottish Courts in simple and untechnical language. Revised diagrams of the organisation of the Courts are published in his Short Commentary on the Law of Scotland. The present writer is grateful to him for his permission to publish excerpts from his Lecture and diagrams showing the organisation of the Scottish Civil and Criminal Courts. She would, however, suggest that one of his statements is too broadly stated or oversimplified. He states of solicitors and advocates - '... there is no atmosphere of stratification between the two branches'. It is true that both branches of the profession take, generally speaking, the same legal training in the same classes at the Universities, and it is also true that in Edinburgh some solicitors, especially Writers to the Signet, feel no sense of inferior status to members of the Bar. Both are, or regard themselves, as belonging to an élite interlocking professional group. As young men they probably frequent the same social clubs or are admitted to the Speculative Society⁸ which, since the eighteenth century has been an exclusive club for cultivating literary criticism and public speaking. On the other hand, in the West of Scotland in particular there are many solicitors who earn more than most members of the Bar, are confident that they are better lawyers than most members of the Bar, and resent the traditional privileges and accepted social status of the Faculty of Advocates. Among such solicitors not a few would favour fusion of the two

8. See Cockburn Memorials p. 73 Among the members of the Speculative Society have been most advocates destined for success in their careers.

branches of the profession and the promotion of the Sheriff Court to be the ordinary Court of first instance for all matters - including actions of damages for death and injury (which must go to the Court of Session if there is to be a jury trial) and divorce (which is a relatively simple branch of the law). Many solicitors also grudge the promotion of so many advocates of moderate talent to the Shrieval bench when there are available many solicitors of at least equal gifts.

The advocate is professionally set apart. He may not be approached directly by a would-be litigant or accused person. There are interposed the solicitor, who deals directly with the lay client and the advocate's clerk who fixes the advocate's engagements for him and arranges for an appropriate fee. Unlike the position in England, the Scottish advocate usually accepts emuneration on a fixed 'tariff' for each piece of work. The solicitor who deals directly with the lay client also takes precognitions of witnesses and deals directly with the solicitors acting for the other party. A solicitor is liable to his client for professional negligence and may sue for his expenses. Indeed the law gives him special advantages to recover what is due. The advocate, however, has not hitherto been regarded as liable for negligence, and in theory he offers a service incapable of evaluation in money terms. Hence he either does not or cannot, according to professional norms, sue for the honorarium which has been agreed by his client with the solicitor concerned. There are only four advocates' clerks serving the whole Faculty - of which about 110 are in attendance at the Parliament House. These clerks exercise great influence on the professional prospects of the advocates on their list, at least at the outset of their careers, and provide an essential

link with the instructing solicitors. One of the advocates' clerks is himself a solicitor, and all are remunerated by the professional client (not by the advocate himself) on the basis of a percentage of the advocate's fee in a particular case.

Lord President Inglis in Batchelor v. Pattison⁹ stated categorically that an advocate cannot sue his client for his fees, and this view is supported by the opinion of the Father of Scots law, Viscount Stair.¹⁰ The theoretical position has been reopened very recently by Mr. D.B. Smith, Advocate. In an article on 'Counsel's Fees' contributed to the Scots Law Times¹¹ he refers to two mid-sixteenth century cases where actions for fees by advocates were held to be competent and quotes Bankton¹² in the mid-eighteenth century and Shand¹³ in the mid-nineteenth century for the view that in strict law this is the correct view. If this is so, the profession has considered its social prestige more important than its remuneration. From a social anthropologist's view both Shand and Bankton are worth quoting. Shand wrote in 1848 'Now that the profession of an advocate is followed to obtain a livelihood much as the business of a law agent or any trade it does not seem that there is any propriety in placing the remuneration on a different footing. This opinion is, however, very different from that entertained in quarters entitled to respect'. Lord Bankton had expressed the opinion that an action for fees was competent but dishonourable - 'though action be competent for such gratification, advocates who regard their character, abhor such judicial claims, and keep in mind the notable saying of Ulpian upon the like occasion, Quaedam etsi honeste accipiuntur, inhoneste tamen petuntur'.¹³

9. (1876) 3R.914 at p. 918

10. Institutions 1.12; 5.

11. 1964 S.L.T. (News) 137

12. Institute 4.3. 4.

13. The Practice of the Court of Session vol. i. pp. 80-81

The role of the advocate from a Scot's lawyer's viewpoint has been so well expressed by Lord President Inglis that his words in Batchelor v. Patterson and Mackersey¹⁴ may be quoted, 'An advocate in undertaking the conduct of a case in this Court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into Court to take the retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard for the wishes of his client, so long as his mandate is unrevoked, and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced.' Mackay adds¹⁵ 'A client is bound by the admission of his advocate in matter of fact and by all pleadings signed by him. It is in his discretion to refuse to examine his client as a witness, and lead as much or as little evidence as he pleases. He may abandon a case

14. sup. cit. note 9

15. The Practice of the Court of Session, i, p. 110

or give up a defence or consent to a judicial remit, or refer a case to the oath of his client's adversary. After a case has gone to a jury, it is in his power to refer it to an arbiter, or even to consent to an adverse verdict'.

In Scotland advocates do not specialise as in England and America. They may be briefed to appear in criminal or civil cases and are 'general purpose' specialists as pleaders in the higher courts. One result, is that much specialist work such as admiralty, taxation and patent problems are usually dealt with by specialists at the English Bar with a Scottish advocate often briefed to comment on possible specialities of Scots Law. Specialisation would be contrary to the traditions of the Faculty, but it may be a harsh truth of the times that specialisation is necessary in modern society and failure to regard this fact creates dangers for the future of the Faculty. In the United States specialisation has been highly developed in the large law offices, as in commercial enterprises. The role of the lawyer in such a setting differs greatly from the essentially 'one man' practice of the Scottish advocate.

Until the introduction of legal aid for civil cases in 1949 and for criminal trials in 1964 the Faculty of Advocates provided free legal aid to those admitted to the Poors' Roll. Indeed a system of free legal aid for the poor was first instituted in Scotland as early as 1424. Advocates who appear for 'assisted litigants' today are now paid a fee at a lower rate than in other cases, and a great deal of litigation and criminal work is covered by the legal aid schemes. This could alter substantially the image which goes back to the seventeenth century at least, of the advocate giving his services gratuitously to plead the cases of the poor or to defend poor persons accused of crime. Hitherto counsel for the poor have been appointed each year by the Faculty, and

it has also been a tradition that a Q.C. would also give his services gratuitously in a murder trial. Indeed in 1958 when Peter Manuel dismissed his counsel during his trial for a series of murders, the Dean and Clerk of Faculty went over to Glasgow to offer their services if required. 'The days in which the doctor and lawyer were the rich men of the community and could afford to spend a fair proportion of their time on unremunerative work of a charitable nature may be past.' This factor and the modern system of State subsidy to these professions may well alter the public image. Already it is clear that doctors and hospitals are sued on a scale which would have been unthinkable before the introduction of the National Health Service in 1947.

Advocates are absolutely privileged in their written pleadings as well as in speaking in Court, provided, of course, that their words are pertinent to the case. They cannot be sued for defamation in respect of statements made as counsel. Moreover, consultations between party and legal adviser are regarded as confidential and immune from disclosure.

Advocates may be censured by a judge for improper conduct in Court - such as using insulting language, and in grave cases of misconduct it would appear that the Court of Session, in theory, may punish by censure, suspension or deprivation of office.¹⁶ However, in modern times disciplinary control is exercised within the Faculty itself - which may censure or strike an advocate off its rolls. This has very occasionally happened when an advocate has been guilty of misconduct, but in such a case in 1874, the Faculty ruled that a widow's rights from the Advocates 'Widows' Fund' would not be affected by the

16. Mackay op. cit vol. i p. 114. All the examples date back to the sixteenth and seventeenth centuries.

striking off of her husband provided the rates continued to be paid. Professional rejection of one member of the group did not involve total severance of the ties which had been established.

The Faculty Community

There are some 300 contributors to the Advocates' Widows' Fund and of these about 110 are in daily attendance at the Parliament House practicing as advocates. For many purposes, however, it would be true to say 'once an advocate always an advocate'. Those who are elevated to the Bench as Senators of the College of Justice or Sheriffs in Edinburgh still meet constantly with their friends and acquaintances at the Bar. Others who are appointed Sheriffs or to administrative legal posts or to University Chairs still take part from time to time in the life of the Faculty Community.

In England the Attorney-General is leader of the Bar. In Scotland the Dean of Faculty is its head. The whole Faculty (whether those voting are in practice or not) elects its Dean and, before an election, considerable canvassing of opinion takes place. In the late eighteenth and early nineteenth centuries political factors counted considerably, and since the Second World War on at least one occasion a 'party' spirit has been apparent at an election, which was unwelcome to many of the electors. On the whole, however, the Dean of Faculty is the man who has gained the highest esteem of the practising bar for personality and professional success. Usually he has been one of privileged social background. Other Faculty Officers include the Vice Dean; Treasurer, Keeper of the Library and Clerk. These all combine their duties

as Officers with practice at the Bar, though the Clerk and Treasurer have often had sufficient private means to act as Officers without relying on professional earnings. Such may be minor gentry or come from families which have built up substantial fortunes in commerce. None of the Faculty Officers is remunerated.

The Dean selects a Council, drawn representatively from the Faculty as a whole, but including, of course, those on whose good will and judgment he can rely. This Dean's Council considers matters of professional ethics and censures conduct which it considers unprofessional. An advocate who has a problem as to correct behaviour may seek the advice of the Dean or Vice Dean who deals with most minor matters of etiquette or discipline. An informal warning may be given by the Dean or Vice Dean. To the Dean is entrusted the honour of upholding the independence of the Faculty even against the Bench when necessary. This may be by private interview with a judge who has seemed to treat counsel without proper respect. Alternatively the Dean may proceed formally to the Court where he is informed counsel is being badly treated, and baton in hand take his proper seat at the centre of the Bar. This usually has sufficed to make the Court aware that its conduct is under scrutiny, though, if this did not suffice the Dean would address the court in vindication of the honour and independence of the Faculty. The Dean's formal intervention has only very rarely been invoked in modern times.

The Faculty of Advocates, as has been explained, is a closely knit community, and is jealous of its public reputation. Scandals are, so far as possible, kept within the family. When an advocate's divorce comes on for hearing, care is taken that the case will be heard at a time and place which is least likely

to attract public attention. If a socially unacceptable situation arises, and the advocate involved is a Faculty Officer, he will be warned by a senior member of Faculty that it is his duty to resign rather than implicate the Faculty's honour. This has happened in one case in living memory when an Officer had been living in Edinburgh with another man's wife and in another case after the 1914-1918 War when an Officer had (through carelessness rather than dishonesty) put his name to a company report which, due to the fraudulent conduct of its secretary had been the subject of severe comment by the English Courts. In both cases the Officers had outstanding professional capacity meriting elevation to the Bench, but in neither case did successive Lord Advocates (though on friendly terms with the advocates involved) recommend such preferment. There is perhaps a certain reluctance to prosecute an advocate for crime except in the clearest cases, and, where there is no public scandal, the image is preserved. It is characteristic that when an advocate does stand trial or becomes the victim of public scandal, he will be treated with special consideration by his brother advocates - even by those who do not particularly like him personally.

This general attitude is the more understandable when it is remembered that the nature of his profession sets the advocate apart to some extent. His hours and days of work do not conform to the general pattern. Thus the Court of Session does not sit on Mondays. In modern days judges and advocates are more likely to golf together on Mondays than attend to their estates. Most of the work of the Courts involving the more senior counsel finishes by lunch time on Friday, and there is usually a substantial gathering of an influential group

of these men at the New Club by one o'clock p.m., and their conversation is largely of matters which concern the Faculty.

Wives and families, in a sense, form part of this close community. Many advocates marry the daughters of judges or other advocates. There are still legal dynasties in the sense that the sons of judges and advocates tend to follow in the profession. Six of the sixteen senators of the College of Justice have at present sons practising at the Bar, and the daughter of at least one Senator is married to the son of another.

An anonymous article, obviously written by a very experienced advocate was entitled On Choosing a Wife.¹⁷ Though it is witty it is also perceptive. The Faculty as a whole identifies itself with the marriage of its members. At the outset of an advocate's career he is required to make some provision for his widow by contributing to the Advocate's Widows' Fund. There is (in 1965) still one widow who has been drawing her pension since 1901. The original idea was no doubt that the impecunious should be excluded and that no Faculty widow should be left with the stigma of poverty after her husband's death; though the annual payments now made would not rescue her from such a state. If the advocate was expected to present a public image, so also was his wife. One illustration may be quoted, from 1947. An advocate's clerk of the old school encountered an advocate's wife who had recently come from the South and had lived in a tradition of war time shopping. She was carrying a parcel of fish. The clerk raised his hat, with grave courtesy explained the impropriety of an advocate's lady carrying a paper parcel in the streets, relieved her of it and carried it himself to her home. Obviously this could not happen today,

17. 1949 S.L.T. (News) 153.

but there are pressures - which some resist - to set patterns for advocates' wives.

Before an advocate's wedding his friends at the Bar will organise a Bar Dinner in his honour at which the former 'devil master' will have an honoured place, and his marriage will usually be an occasion where the same friends and their wives meet again socially. The bride will probably have been too preoccupied to learn from previous experience that there are inconveniences in marrying a man whose home is also his office and who (if successful) will have little time to spare for her entertainment or even for much conversation. If there is conversation, so much does the legal mind think in terms of facts and arguments that this flavour may linger in domestic discussion and in his attitude to the children. Again, a man holding consultations or grappling with difficult points of law can seldom abide noise - which creates problems when there are children in the house.

The anonymous author writes 'I do not pretend to know how the wives of other advocates spend their time during their husbands' working hours ... However helpful your wife may be, the fact remains that unless she is herself a lawyer she cannot take any real share in your professional work. Apart therefore from providing an atmosphere of domestic peace and security she cannot share your evenings ... Inevitably, and regardless of what the truth may be, in season and out of season, she will boastfully complain to the wives of your competitors that her poor husband is terribly busy. Who', he concludes 'is qualified for the rôle of an advocate's wife? Someone who is accustomed to loneliness and finding her own companionship and amusement - perhaps a sailor's widow! ' Many of the wives find companionship and amusement with other advocates' wives in like

situations. Others opt out.

Faculty Patronage and Politics

The Faculty itself exercises patronage in various fields and Crown patronage affecting members of the Faculty is a consideration which many have in mind at various stages of their career. Crown patronage is in effect exercised on the advice of the Lord Advocate who is himself a member of Faculty. Generally speaking, few members of Faculty who experience financial difficulty through insufficient practice have been allowed to lapse into a condition which drives them to a change of occupation unconnected with the Faculty itself.

Various Law Chairs at Edinburgh University are in effect wholly the Faculty of Advocates' gift, while the Faculty has also a say in certain other University appointments. The Chairs which are filled on Faculty nomination are those of Public Law, Scots Law, Civil Law and Constitutional Law. In fact, in the past as has been explained, there was a measure of hostility on the part of the Faculty towards law teaching in Edinburgh University, and this seems to have been assuaged only through Faculty participation in making appointments. Too often this right of patronage has been used to nominate men with few claims to outstanding scholarly ability and in effect as a 'perquisite' for a young advocate or as a subsistence for an older advocate who had failed to succeed. Part of the story is told by Lorimer in Studies National and International¹⁸ and by T.B. Smith in Studies Critical and Comparative.¹⁹ Lorimer who was appointed to his Chair in 1862 deplored the fact that none of his predecessors, despite

18. esp. at p. 235

19. p. 69 et seq.

their professional legal ability, persevered in the tradition of scholarly law teaching.

The Faculty puts forward two names for certain Chairs of Law to the Curators of Patronage of the University of Edinburgh, and by custom the first of these is then appointed by the University. On one occasion where the Faculty feared that the true nominee might not be accepted, they put as the first name on their list that of the Dean of Faculty, well knowing that he would refuse. As in the cases of Bell, Hume, Lorimer and Candlish Henderson this Faculty patronage has been wisely exercised, but there have been occasions when the candidate selected has been a member of Faculty whose qualifications were minimal. In 1947 the Normand Committee on Legal Education in Edinburgh University recommended (with one dissenter, an advocate) that the patronage over Law Chairs at Edinburgh University should be abolished. At the present time abolition is still being urged, but with special vigour in certain academic circles as University education as a whole and legal education in particular acquires a new look.

Another important appointment in the Faculty, but not on its nomination, is the Procurator of the Church of Scotland - its legal adviser. This is one of the medium 'plums' of the profession, and carries considerable prestige and influence in the country as a whole.

The Sheriffs-Principal are Commissioners for the Northern Lighthouses (corresponding to Trinity House in England). Appointment to the post of Secretary lies in their gift and in the past they have appointed advocates if any suitable were available. However, the most recent appointment was of a man with maritime experience. As Lighthouse Commissioners the Sheriffs Principal have, as it were, a special club within the Faculty. Each year

they go on a voyage of inspection of the Northern lighthouses in the 'Pharos'. This is an occasion of considerable social importance, and its traditions are of long standing as appears from the Scott notes to 'The Pirate'. The Commodore of the day (one of the Sheriffs in rotation) presides at table with ceremony. Yachting caps are worn with a special badge during the day, and the Commissioners dress for dinner. They are served with every attention to detail. 'The waters' are placed on the table at regular intervals and are served ceremoniously; the catering is luxurious and the intimate and healthy life aboard the Pharos brings together in special intimacy those senior members of the Bar who have been appointed Sheriffs Principal. One of their staple topics of conversation is the importance of their office vis-à-vis the Sheriffs Substitute, many of whom regard the office of Sheriff-Principal (except of the Lothians & Peebles and of Lanarkshire) as in the nature of a sinecure.

At this stage it may be appropriate to mention the rôle of the Lord Advocate and the factor of politics in the preferment of members of Faculty to judicial and other appointments. From the time when the Office of Scottish Secretary was put in abeyance (1725) until 1885 when a new office of Secretary of Scotland was created, the Lord Advocate was not only a Law Officer but also the Government's adviser on Scottish affairs generally. He also controlled patronage to appointments in Scotland. Since 1926, when the Office of Secretary of State for Scotland was created, the political influence of the Lord Advocate has declined, but he still controls preferment to legal appointments. Hitherto the Lord Advocate has normally been a Member of Parliament supporting the party in power. This has, however, not invariably been so. The late Lord Macmillan was not, and during the years 1962-64 Lord Advocate Shearer was not a Member of

Parliament nor officially committed to any political party. Neither of the present Scottish Law officers are Members of Parliament and this may be the pattern of the future - with important repercussions on the Faculty. At the end of the eighteenth and beginning of the nineteenth centuries; as Cockburn's Memorials clearly illustrate no advocate of the party out of power could hope for preferment. Since then political affiliation has been a considerable factor in securing preferment. Indeed on the 'knock for knock' principle affiliation with one of the large political parties may be more useful - even when the other is in power - than political neutrality or adherence to the Liberals.

It is virtually impossible for an advocate to combine attendance at Westminster with practice at the Bar. If, therefore, an advocate is elected to the Commons and his party is out of power, his situation is unenviable. If his party is in power, he may be given office as a Law Officer. In practice only advocates who hope to become Law Officers or have private means, wish to enter Parliament. Thus Britain's lawmakers in modern times include virtually no Scottish lawyers - which contrasts with the situation in almost every other country. Paradoxically this does not deter advocates from associating themselves with party politics and even standing for Parliament - sometimes in the hope that they will not be elected if their party does not succeed in gaining control.

Perhaps not unnaturally the Lord Advocate who controls legal preferment in Scotland has his own future in mind. Cockburn's opinion of the office of Lord Advocate written in 1854²⁰ is still substantially true; 'He knows that the probable shortness of his reign as Lord Advocate makes it not worth his while, and scarcely possible for him, to acquire the public and Parliamentary

20. Journal ii, p. 310

qualifications of a statesman. No sane man takes the position of Lord Advocate except to get well quit of it'. If there is a vacancy for the Chair in either Division or for a Scottish Lord of Appeal in Ordinary, the Lord Advocate (if he has put in a reasonable period of office and has confidence in his gifts) will normally nominate himself for the vacancy. Thus, apart from the short tenure of Lord Moncrieff prior to the appointment of the late Lord Justice-Clerk Thomson who died in 1962, the two top appointments in the Court of Session have been held in modern times by former law officers who had been affiliated to a political party. Other appointments to the Bench of the Court of Session may also, but need not necessarily, result from political associations. Professional distinction is usually expected. The Dean of Faculty (who need have no political party affiliations) is normally promoted to the Bench, and others whose eligibility is usually uninfluenced by party factors are the Vice-Dean and Procurator of the Church of Scotland. It is rare, however, for a former Law Officer not to be elevated to the Bench, even though elevation may come through the party in opposition to his political allegiance.

Appointments to the office of Sheriff Principal have often in the past been influenced by the fact that the advocate appointed has stood for Parliament. Moreover, the Advocates-Deputy who represent the Lord Advocate as public prosecutors change with the administration and are normally selected from those who support the party in power. The Lord Advocate also appoints standing counsel to various public bodies, and in making such appointments usually exercises his patronage to assist some junior whose practice could benefit with encouragement. These appointments do not change with the Government, and

political considerations do not seem to influence selection. Appointments as Secretaries to the Lord Advocate Department are made from members of Faculty with suitable qualifications.

The life of a busy advocate as it has been described is undoubtedly an arduous one. Apart from legal and forensic skill and determination, a successful advocate requires good health and stamina. The profession is not one which can be practised in partnership. Therefore, in a highly competitive group, a spell of illness or ill fortune, especially for example after taking silk, may have serious consequences on prospects. For those advocates who seek security rather than the glittering prizes as advocate there is always the office of Sheriff-Substitute which, especially since the last War, has attracted able men to the more important Courts. The designation is misleading as the Sheriff Substitute is for most purposes the territorial 'judge ordinary' in Scotland. Since the 1939-1946 War the status and emoluments of these judges has been raised considerably, and those appointed to the more important Sheriff Courts are men of acknowledged ability in the profession. Practically all such appointments are made from the ranks of the Faculty of Advocates who are, of course, a small minority of the Scottish legal profession as a whole. It is also generally recognised that advocates who have not been of outstanding quality have not infrequently been appointed Sheriffs Substitute in the less important Sheriff Courts. The preference for advocates over solicitors for appointments to the Shrieval bench has been the subject of some criticism from the solicitors' branch of the profession who assert that an advocate of indifferent ability may be preferred to a solicitor of recognised quality. Advocates may also expect appointments as Chairmen of various public bodies; such as the National Assistance Tribunal.

To summarise, with so many offices available to a small group of advocates, all of whom are reasonably well known to the Lord Advocate and to their professional brethren, few if any who are admitted to the Faculty fall by the way. Even the younger advocates are encouraged and given opportunity to show their abilities through commissions to take evidence granted by the Bench. Some advocates may be tempted to better salaried posts as advisers to large industrial and commercial concerns, but on the whole advocates finish their professional lives in places for which they have qualified themselves by membership of the Scottish Bar and for which such membership gives them a priority when selection is made.

Summation

An analysis from a social anthropological point of view will be made presently. To sum up on the purely descriptive level a few provisional conclusions may be stated.

The classes from which the Faculty is now recruited have changed noticeably from the period described by Phillipson. Subject to the heavy initial financial outlay required, the Faculty is in a sense democratic in recruitment but aristocratic in function. There remains an inner group of minor gentry, sons of judges, advocates or of wealthy professional mercantile or industrial families. Sons of the manse and sons of solicitors are in particular a substantial element. These come from an essentially Scottish professional tradition. There has been a tendency for advocates in these groups to have taken a degree at Oxford or Cambridge, and since the law degree there is designated B.A., many take their first degree in Law there, and are permitted to count it as a qualification in general scholarship. This has increased the trend towards anglicisation of the Faculty of Advocates in the sense that many of its members speak and think

much as their opposite members at the English Bar, though in some cases the greatest enthusiasts for the Scottish legal heritage have shared their educational background between England and Scotland. Though increasingly the law of Scotland is being influenced by English law, and advocates rely, when it suits their case, on English authority, the Faculty would resist to the uttermost any encroachment on its particular privileges - either through fusion with the English Bar or fusion with the solicitors' branch of the profession in Scotland. The advocate's place in the community is still widely respected, ensures high status and gives good prospects of a reasonable livelihood. The moderately glittering prizes of the Bench in the Court of Session are reserved for advocates who have managed to persevere in practice. There are other openings for those who do not, and these are respected in the community. Leading solicitors may earn more or be equally able as lawyers, but their public image is not on the same level.

Nevertheless, the image of the Faculty is not what it was in Cockburn's time. He deplored the falling off of work in the Parliament House, a tale taken up more bitterly by Professor A.D. Gibb in the 1930's in his 'Shadow over the Parliament House'. Probably at the present time the complaint is not of less work but of less interesting work. State subsidising of litigation has been a monetary blessing to the Bar, but may have lessened the status of advocate. Writing so close to the introduction of legal aid in Scotland it would be unsafe to reach firm conclusions on this issue. Large enterprises, whose managers and directors command larger remuneration than advocates, are accustomed to employ specialists, and regard advocates much in the same way as they do other specialists. Moreover, as 80% of all enterprises in Scotland employing 200 or more employees are controlled from the South, those in control tend to view the Scottish advocate as operating in a provincial setting. The

advocate's image in Scotland is more distinguished than in Britain as a whole. Within the legal profession in Scotland, the successful solicitor may regard the advocate with some envy on account of his popular image, but would not concede that it rested on professional ability. The Sheriff Court where the solicitor has equal right of audience, has extensive jurisdiction. Were divorce jurisdiction to be transferred to the Sheriff Court and were civil jury trial to be abolished the junior Bar would suffer severe loss of earnings. Neither of these classes of litigation belonged to the original jurisdiction of the Court of Session until the early nineteenth century. Retention of the status quo is defended by some on the grounds not of logic and convenience but by the argument that any change would imperil the survival of the Faculty as a separate group. This argument indicates a sense of insecurity regarding the future. It may well be that this present study is appropriately timed. The traditions of centuries have given the Faculty of Advocates a special status in the community. It remains essentially Scottish in recruitment and essentially Edinburgh in location. Whether in a changing social and economic environment it can retain its privileges and relative status in the community cannot safely be predicted. Ultimately its privileges are safeguarded by the Union Agreement, as were those of other aspects of 'the establishment' such as the Church, royal burghs and heritable jurisdictions. That Agreement has not proved an adequate safeguard for these other aspects. The Faculty may yet for some time prove more fortunate, but is unlikely to recover the prestige it enjoyed in Edinburgh's Golden Age.

P A R T IIChapter 5INTRODUCTION TO ANALYSIS AND INTERPRETATION

The first part of this thesis has been devoted to sociographic description of the Faculty of Advocates in an historical, comparative and contemporary context. This was an essential preliminary task. The development of the structure and function of the profession must be seen in order that its present condition may be understood. The institutional framework within which the advocate's professional activities are carried on, his rights and duties and his place in the legal system have now been described. At this stage it becomes necessary to attempt analysis and interpretation from the standpoint of social anthropology. After this introductory chapter it is proposed to discuss the advocate's status and role in general; to consider his professional 'life cycle' as he progresses in his career, and to evaluate his status and role in relation to the wider world - his public image. Following on this it is proposed to examine his role-set and to identify and categorize the various devices used to prevent role-conflict and to enable him to play his part according to the stated norm of behaviour laid down by the court and by the profession itself. When this ground has been covered, it will be appropriate to set forth in the Conclusion the main findings which seem to be justified by interpretation of the descriptive material.

A famous dictum of Malinowski 'There are no facts without problems' is quoted by his pupil Raymond Firth. Malinowski himself expresses this idea

in writing¹ in a rather different form 'What we are demanding is ... the study by direct observation of the rules of custom as they function in actual life. Such study reveals that the commandments of law and custom are always organically connected and not isolated that they only exist in the chain of social reactions in which they are but a link With this the theoretical arguments of Anthropology will be able to drop the lengthy litanies of threaded statement....' Much of this thesis has been descriptive of the history of the institution, its training (compared with training for lawyers in other Western systems), and what anthropologists might call the sociography of the group. The second part of the work, the analysis of some of the material described, has had to be limited mainly to one aspect of the advocate's life and his role playing. What are the norms of his professional role? How does he perform them? Where does any possibility of role conflict or of role contamination lie? This is the problem which has been investigated and there may seem, in Part I at least, to be an excess of facts for its explanation. The writer had hoped to analyse more of the descriptive material than has been possible in this one thesis. She still hopes to analyse much of it at a later date.

Since most social anthropologists, including those with great success and reputation, have worked in societies that have or had no written history, that is to say among preliterate or non-literate peoples, it is not surprising that the anthropologist has failed to indulge in the interests of historians. Further, most small-group descriptions and analyses in modern society have similarly dealt with subsystems lacking any prolonged history. Such illuminating studies as that of Roetlisburger and Dickson² in the 'Bank Wiring System' and of W.F. Whyte³ in 'Street Corner Society' and 'Human Relations in

1. Crime and Custom in Savage Society pp. 125-6

2. Management and the Worker passim.

3. Human Relations in the Restaurant Industry. Street Corner Society. passim

the Restaurant Industry', which have been of the greatest importance in the analysis of group norms, role-fulfillment, leadership and social control had no need of historical description. In the study of this particular small group in Scotland the writer is of the opinion that its present state must be seen in relation to its long and well-documented past history. The large amount of factual and historical material had to be collated before any analysis could be begun. In addition to the academic reasons for this process, there was the social reason that this group of people have a tendency to introduce the theory 'Falsum in uno, falsum in omnibus'; which, however illogical it may be, is a readily available stick with which to beat any poor recorder of their system.

Durkheim⁴ so often divorced sociology from history that the effect of his writings seems often to have been that the sociologist - and more particularly the anthropologist - deliberately (or faute de mieux) denies himself the help that the past may shed on the present. Marx and Weber certainly followed the opposite path; the most recent translation of a work of Sartre⁵ in the same tradition has confirmed the writer in her view that the history of an institution can only illumine the hypotheses that the observer in the field might construct. The comparison between several systems of Western law development has also seemed to be necessary because the roles of judge and of lawyer have emerged differently in different Western countries. This it is hoped is demonstrated in Part I, Chapter 2. The comparison between the Scottish system and the four others described shows that much of the material has had to be seen both in time and in space. Lawyers and 'the law' - at least in the Western world - remains ethnocentric in the fundamental sense that it is the

4. Division of Labour etc. passim

5. The Problem of Method, passim.

"law' of a particular jurisdiction or bench, or board of officials".⁶ It does not do to confuse the systems nor to indicate in however small a point that the exact differences in their development and structure have not been noted.

The writer has been greatly interested to note that in twenty two years of observation of one small group and in four years intensive study and participant observation, she has so frequently been wrong in theory-construction. She is rather surprised that many social anthropologists, without the advantage of knowing the language or customs of those whom they observe, manage to be so certain of their theory and knowledge of any given aspect of a society after two or three years residence within the territory of the group. The nuances of social behaviour amongst this small group of lawyers in Scotland would, she believes, not be revealed in any such period of time to any 'outsider'. That the 'insider' may lack objectivity is clear; yet it seems even more clear that it is too easy to jump to conclusions after even ten or more years of 'field-noting'. The 'pattern' or 'structure' might be clearer after a short view; the reality could hardly be so.

The mere collection and narration of facts, whether historical, comparative or sociographic is of little use unless these facts are relevant to a particular problem. Malinowski's⁷ views on this matter have already been discussed. It is interesting to note that Mayhew⁸ over a hundred years ago made the same point, as did Malinowski in 1926. 'Facts', he said, 'according to my ideas, are merely the elements of truths and not the truths themselves; of all matters there are none so utterly useless by themselves as your mere matters of fact. A fact, so long as it remains an isolated fact is a dull, dead, uninformed thing: no object nor event by itself can possibly give us any

6. Riesman op. cit.

7. See p 123 supra

8. London Labour & the London Poor, iv vols. 1861.

knowledge, we must compare it with some other, even to distinguish it; and it is this distinctive quality thus developed that constitutes the essence of a thing To give the least mental value to facts, therefore we must generalise them, that is to say, we must contemplate them in connection with other facts, and so discern their agreements and differences, their antecedents, concomitants and consequences. It is true that we may frame erroneous and defective theories in so doing ... nevertheless if theory may occasionally teach us wrongly, facts without theory or generalisation cannot possibly teach us at all.' The only addendum the present writer would make to the excellent advice of Mayhew and Malinowski would be a parody of the equally famous Mrs. Beeton⁹:- 'First catch your facts'.

The object of this thesis is not simply to describe the Faculty of Advocates, however illuminating such a description might be; it is to see in this structural-cultural-functional pattern the role the advocate plays, how his training fits him for it, how he is helped both institutionally and by symbols to play it and to examine the strains and conflicts that might prevent his giving a proper performance.

What is the system in which he plays his role? There are many and diverse systems of social control based on varying kinds of legal and judicial procedures. Some recapitulation of the development of this unique Scottish legal system may illuminate why the role of the advocate is as it is, and, by comparison with other models, show why it has to be so. Other western systems share most of the basic reasons for the structuring of their legal professions. Some comparative account of these has been given in Part I¹⁰, and a further discussion of their evolution would be out of place here. The Scottish system differs in

9. The actual mis-parody is from one Hannah Glasse (1747) who, according to the Oxford Dictionary, wrote 'Take your hare when it is cased' and is always misquoted as writing 'First catch your hare'.

10. esp. Chapter 2.

particulars, and, therefore, a few main points may be made to explain the need for the system to be serviced by professionals at all and for the segregation of the roles which has led to the creation of the status 'advocate'. Only by tracing the system from its origins will the specificity of function, of role and of norms inherent in the status emerge.

Historically the basic influences on the development of western type legal systems are the Roman Law, the Church and the 'Barbarian-Feudal' systems. During the Dark Ages the Church through Canon law kept the Roman system still in operation as did the vulgarised Roman law of the Barbarian Kingdoms. After the General Reception of rediscovered Roman law, from the twelfth century onwards, the secular courts tended to adopt and follow the Romano-Canonical procedure of the Church Courts, and the early professional lawyers were ecclesiastics.

Two different attitudes were taken to 'representation' of parties by the 'Feudal Barbarian' and by the ecclesiastical courts. In the former representation was the exception, since parties were expected to appear in person to assert or defend their rights. In the Middle Ages the judicial process and the pleadings in court could be loosely compared with Gluckman's account of the Barotse.¹¹ The litigants presented their own case, produced their own witnesses, there was no fiction of judicial ignorance and the procedure was inquisitorial. The communities in which trials were heard were small, the character and general behaviour of the litigants were known and were relevant to the decisions that might be reached. There were at this stage no institutionalised 'pleaders' with specific functions. The Scots feudal courts were presided over by the feudal superior, or often his delegate, and the assizers were vassals who owed 'suit of court'. These were the origin of the jury. (In Scots the word 'assize' still implies a criminal jury).

11. Max Gluckman. The Judicial Process among the Barotse of Northern Rhodesia passim.

The attitude of the ecclesiastical courts differed and it was in them that representation of the client first appeared. Clearly abbeys, churches and the like could not appear 'in person', and the Canon law tradition was to allow appearance by procurator. This privilege was also granted to these institutions in the civil courts - as to women, children, towns, guilds and the like - for the same reason, and they were allowed to appear by champion in trial by battle - which was, of course, a legal process.¹² 'Law is many things'.¹³ The society comprised by this time specialised institutions beyond the kindred and the priest. This is reflected in the development of the legal system and its need for functionaries with specialist knowledge. Eventually the privilege of representation became a right¹⁴ largely, it may be thought, for the convenience of the courts as the law became more complex and the jurors ceased to be able to decide according to their own knowledge of fact and law.

It may be relevant to note here that a recent 'fashion' in Scotland for accused persons to defend themselves, begun by Peter Manuel, the murderer, in 1958¹⁵ has caused considerable inconvenience to the Courts, as does the pleading of the litigant in person anywhere in the modern western system. The rigid rules of evidence and procedure, unknown to the layman, are ignored, relevance is unknown, and the time of the court is largely wasted. The system has to adapt to this ignorance of its specific rules and functions by becoming more inquisitorial, the prosecutor and the judge must help and question the accused or party litigant instead of listening to the plea of his trained defender. The specialised, institutionalised role of the advocate has become a necessity for the proper conduct of the law within a highly differentiated society where the intricacies of the legal system cannot be known to the laymen.

12. Jenks. Short History of English Law p. 198

13. Max Gluckman, quoted by Michael Banton

14. Brissaud History of French Private Law p. 544

15. J.C. Wilson The Trial of Peter Manuel. The Man who Talked too much

For the development of this role and its normative order it is necessary to go back to the late thirteenth century when, in addition to the ecclesiastical lawyers, a law profession emerged - though these were often clerks in minor orders - while during the fourteenth and fifteenth centuries the lay profession came to be organised with strict discipline and definite ranks. Scotland, which lay out of the mainstream of European advance, developed both law and a legal profession later than France or Italy, which were her earliest models and influenced the structuring of the Scottish profession. Further, until the establishment of the College of Justice in the first half of the sixteenth century, much of the legal work not handled in the local feudal courts was dealt with in the Church Courts by ecclesiastical lawyers. The same lawyers might appear in the lay as in the ecclesiastical courts.

Leaving aside the judges and the notaries as having specialised functions, there are references in the earliest known Scottish Acts to 'forspeakers' and 'procurators'. Their functions came to be merged to a large extent but imply different ideas. The differentiation of the system at this time differs in orientation from that obtaining today. The 'forspeaker' or prolocutor was the 'prisoner's friend' - adviser - who is found in many legal systems. In the Njal Saga he is to be found in a similar form and with the same function. He is an intermediary figure in the development of a legal system because he lacks two of the main functions of the modern advocate or barrister; he owes no duty to the court and he is not yet part of a professional group with norms and ethics to which he has to conform. The sociological importance of the further differentiation of his function and his role is clear. Lacking a duty to the court and to a professional norm he has an irresponsibility which society cannot tolerate. He is still recognised in Britain in military law. In Court Martial procedure¹⁶ the status 'prisoner's friend' still exists. This

16. Rule of Procedure 87D under the Army Act, 1955.

person may advise the accused on all points but, unlike a defending counsel or a defending officer, he may not examine or cross-examine or address the Court.

The procurator (attornatus in English Law) did not just support a party's case. He represented his person and his cause under a mandate, and might appear in the latter's absence. Moreover, one of his functions seems to have been as a 'man of business'. The two branches of the profession were still one. So closely were pleaders identified with their clients that, since the party himself had to take an oath (which significantly is still required in Scottish Divorce proceedings) that he believed his cause to be just, so the procurator had to take a like oath,¹⁷ and indeed to abandon the case if he came to consider it unjust.¹⁸ Originally it would seem that the procurator did not merely require to be appointed by the party but also to have the consent of the Court, thus emphasising the responsibility which the procurator or advocate owed to the Court as well as to the client.

The early procurators or advocates (the terms are used as interchangeable) were sometimes reluctant to act in unpopular causes - especially against the Government. There is an instance recorded in 1522 of an advocate 'taking instruments', i.e. having it 'on the record' that he had been 'compelled' to procure by the Lord Chancellor and the lords. In 1587 the Act 1587 c. 38 giving general right to engage advocates in cases of crime and treason was reinforced by the Act 1587 c 91 which ordered the judge to overcome advocates' fears of unpleasant consequences by compelling them to procure and use all lawful defences.¹⁹ By these steps the responsibility of the advocate to the court (and of the court to the advocate) as well as to his client was stressed,

17. 1430 A.P.S. ii c.16, 19.

18. 1534 B.S. ii, f.31

19. See also Lord Balmerino v. Forrester (1605) Mor. 341-Avocate compelled under pain of deprivation to act against a Lord of Session.

as was his independence of the state. (This may be contrasted with the concept of the professional in Communist countries where the lawyers' co-operatives allocate work and expect advocates to observe the basic norms of the 'people's democracies' rather than follow a set of norms set up by their relationship to the court or to their profession)²⁰ The advocate's membership of an organised professional body also dates from the establishment of the College of Justice, of which a certain number of procurators were made members.

In Scotland it is the incorporation of advocates in the College of Justice, which has led to a specialisation of function. Only those so incorporated had a right of audience there. The other societies of procurators (and many are still so designated e.g. the Royal Faculty of Procurators in Glasgow) who were not entitled to plead in the Supreme Courts of Scotland continued to discharge an undifferentiated function as men of business and as pleaders in the local courts. From the establishment of the Court of Session as a College of Justice in 1532 the two branches of the profession - advocates and the solicitors - begin to emerge, and, though it was not until the eighteenth century that advocates shed all the functions of men of business, they specialised in advocacy as the most honourable and distinguished aspect of the legal profession. The development of the law into a more complex and technical science after the establishment of a permanent, professional judiciary made such a corps of specialists necessary for the efficient conduct of business. The role of advocate developed in relation to the role of the judge as well as in relation to the needs of a growing society, and the pleader was given a special status in order that he might discharge a special function in the

20. Schlesinger, Comparative Law, p. 205

highest courts. In 1532, though the practice of engaging professional representation was recognised by the selection and licensing of eight 'procuratoris or advocatis' of 'best name, knowledge and experience',²¹ it was also contemplated that parties appearing in person might attend in court. The securing of the best available advocates to assist the highest court is in itself significant. They would be best able to unravel legal technicalities and (perhaps) save the Court's time. The segregation of the role of advocate was intended to lead to increased justice and efficiency, and the advocates required the services of clerks and agents in order that they might concentrate on their primary task. The work of the lower courts, e.g. the Sheriff Courts, only became complex and involved considerable sums or property in quite modern times. There was not the same need for specialisation there and the lawyers below the rank of advocate were therefore permitted to practise in those courts.

It may be observed that, unlike the development in France of a number of local Bars, in Scotland there was only sufficient high level work to justify a College of Justice in Edinburgh. Hannay²² suggested that the original College of Justice was modelled on the College of Justice at Pavia, but this idea has been scotched by Professor Stein.²³ The Colleges of Judges and Advocates of Italy provided, however, a sufficient general description of what James V had in mind for the purposes of correspondence with Pope Clement. The incorporation of judges and advocates in one college undertaking specialist and high level work assisted role-segregation within the legal profession in Scotland from the start, and centralised appellate jurisdiction as well as the concentration of the most important litigation in the Court of Session in time confirmed the monopoly. Moreover, the highest prestige attached through-

21. Hannay College of Justice p. 137

22. op. cit. p. 49 et seq

23. Stein. The College of Judges at Pavia (1952) 63 Jur. Rev. p. 104 et seq.

out Western Europe to those who practised in the Central Royal Courts. The high ranking of the status advocate stems from this time.

Had the function of advocate extended in the direction of the 'man of business' the small numbers of the group would have proved inadequate. This would have led to dilution and less specificity of function. Partnerships might have developed with lawyers specialising in different types of case. Had the law not been technical the role of 'forspeaker' (who might be seen to have his counterpart in the modern 'actor advocate')²⁴ might have gained greater prominence. Combined concern with fact and law on the part of judges and advocates alike encouraged mutual reliance not only on professional skills but also on professional integrity.

It may be recalled that in the second third of the nineteenth century²⁵ there was a reaction in the United States against the professional skills and traditions which had been carried over from Colonial times and in many states every voter of good character was allowed to practise law. This led to a serious deterioration in professional standards. It also proved to be an impossible ideal in a society growing ever more complex in its division of labour and its social institutions. That it could have happened at all was probably due to the idea that 'lawyer's law' was 'undemocratic' and that with an untechnical approach to legal problems a 'forspeaker' was sufficient. The need for the specific status and role of the lawyer was ignored. Thus law became a money getting trade without a sense of public or professional duty. The reaction against this and the modern insistence on specialised training and legal ethics have already been discussed.²⁶ The ethics of criminal practitioners have perhaps been more under suspicion than of those acting in civil cases, but modern systems recognise that the state itself owes a duty to

24. See p.164 *infra*.

25. Drinker, Legal Ethics, p.19

26. See p.48 supra

defend its probable criminals. Quite recently in Gideon v. Wainwright,²⁷ the Supreme Court of the United States held that the Fourteenth Amendment requires counsel to be assigned in a criminal prosecution. It was not until 1836 that a person accused of felony in England, for which the penalty was death, was entitled to representation by counsel (except for argument on a mere point of law). This stresses another distinction in counsel's function - the difference between legal adviser (agent or solicitor) and professional representative undertaking all aspects of a client's defence. The functions of 'mouthpiece' and of the 'procurator learned in the law' have both been blended in the role of the Scottish advocate from earliest times in civil cases and in criminal cases generally at least since the end of the sixteenth century. This has assisted technical efficiency and dispatch of business, and in a small profession which does not specialise in types of cases but in advocacy the norms respected in civil causes are observed also in criminal causes. There is less danger of counsel becoming contaminated by the standards of a criminal sub-culture through specialisation in criminal work, as is allegedly feared by some lawyers in the United States. Perhaps even in England the reputation of the Old Bailey practitioner does not stand as high as that of barristers in other branches of practice. Rather than attempt comparisons with models of less developed systems described by anthropologists, it seemed more illuminating to use an historical approach to show in the growth of this particular legal system, the unfolding of a social system and the changes in its structure which were necessitated by the growing complexity of the community in which it had to operate. As division of labour, differentiation of institutions and of

27. 372 U.S. 335 (1963)

the relationships between persons grew more complex so did the law which controlled and administered them. The function of the advocate within the structure of the legal system and the necessity for his existence became clear from the examination of his origins. It is possible now to see the limits given by the system itself, within which the occupational role can be played. It also becomes clear in Parson's words²⁸ that the 'results have become so closely interwoven in the fabric of modern society that it is difficult to imagine how it could get along without basic structural changes if they were seriously impaired'. There is little if any structural disharmony either in the legal system itself, within which the advocate's function and norms are so clear, or in its relationship to the wider social system. Again in Parson's words²⁹ 'here the elements of conflict are more those of scope and concrete content of interests than of structural disharmony as such'. The possible existence of these elements of conflict will be discussed in later chapters. It is suggested here that the rationality of the system, its specificity of function, of norms and of roles leave very little room for conflict, and that in the 'concrete content of interests' conflict is controlled by the high degree of technical and professional training inculcating as it does emotional neutrality, and by the smallness and homogeneity of the group. In the limited sphere in which role-conflict or role-contamination might be found it is suggested that informal controls have a predominant place and lead to a high degree of social harmony.

The system itself with the rigidity and specific role-playing it demands of the advocate, places strains on him. His relationship with those professionally nearest to him, with his 'role-set', to use Merton's terminology,³⁰ will be seen to be controlled to a large extent by informal sanctions and by

28. Talcott Parsons Essays in Sociological Theory. The Professions and Social Structure p. 34

29. Talcott Parsons op. cit. p. 46

30. See p. 191 infra

devices, symbols and professional mores long known and accepted, and, as yet, unaffected by any substantial degree of social change. Megarry suggests much the same state in England.³¹ 'The powers of the Disciplinary Committee and of the Benchers, are, of course, important in the last resort; the two branches of the profession must have adequate powers to purify their membership. But what in many ways is more important is the existence of strong and effective professional opinion. This not only dissuades from conduct that would fall within the ambit of disciplinary proceedings but also checks much conduct which, though outside that ambit, is undesirable. Most important of all, this professional opinion is not merely a deterrent to misconduct but also encourages and maintains all that is best. The existence of such a body of opinion in England is neither mirage nor aspiration, but solid reality; and for that all must be grateful.' In examining the Scottish system Megarry's judgment has been amply confirmed, and indeed within the smaller and closer community evidence of the informal professional sanctions is more readily available.

The institutional features which differentiate the system and therefore the patterns 'in terms of which the actor is orientated towards his situation of action'³² are now disclosed clearly as the legal system itself, the judiciary and the profession. The three have grown together, and are part of the same structure. The professional group is differentiated and is itself structured in clear relation to the total system. The group is small, it must be remembered, and unusual in the modern Western world. Goode writes³³ 'Characteristic of each of the established professions, and a goal of each aspiring occupation, is the 'community of profession'. Each profession is a community

31. Megarry Lawyer and Litigant in England, p. 54-55

32. Talcott Parsons, 'The Theoretical Development of the Sociology of Religion' p. 179

33. Community within a Community. The Professions p. 194

without physical locus and, like other communities with heavy in-migration, one whose founding fathers are linked only rarely by blood with the present generation. It may nevertheless be called a community by virtue of these characteristics: (1) Its members are bound by a sense of identity. (2) Once in it, few leave, so that it is a terminal or continuing status for the most part. (3) Its members share values in common. (4) Its role definitions vis-a-vis both members and non-members are agreed upon and are the same for all members. (5) Within the areas of communal action there is a common language, which is understood only partially by outsiders. (6) The community has power over its members. (7) Its limits are reasonably clear, though they are not physical and geographical, but social. (8) Though it does not produce the next generation biologically, it does so socially through its control over the selection of professional trainees...'

The Faculty of Advocates is, however, a community with 'a physical locus', it has no 'heavy in-migration', and its founding fathers are often linked by blood with the present generation. Goode's list of characteristics delineating the 'community' apply to the Faculty to a great extent, but it is worth noting that he does not even suggest that there could be a professional group whose limits were physical and geographical as well as social. The Scottish Bar is such a group, and is in all senses a 'community within a community'. In the later description of this fact it will emerge that in its stability and continuity, its clear role models, the interdependence of its members and their role set, its relationship to outsiders, its high degree of informal social control and even in its kinship and marriage links it is a close and homogeneous community. It will be seen also that its social density is high

as would be expected in such a situation, and that this social density leads to the expected results. The self-government of any profession must be strict or the wider society might step in to control professional behaviour. The diffuse sanctions in this close knit community add immeasurably to the degree of control exercised by the governing professional body.

How does the general public see the system and the place of the advocate within it? Is it a 'wonderful accommodation to human fallibility' as one informant suggested? To the public the law may seem infallible, and in a sense the intention of the judge and the lawyer is that the public should so see it. The individual trained in the law knows that it is not infallible, and the initiate alone knows that, though the law will be done and be seen to be done, justice is not always obtained. 'Even in a relatively static society, men have never been able to construct a comprehensive, eternised set of rules anticipating all possible legal disputes and settling them in advance Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social ... conditions Much of the uncertainty of the law is not an unfortunate accident; it is of immense social value.'³⁴ Cardozo also warns against the tendency 'in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty'. The principles and precedents are 'in truth provisional hypotheses'.³⁵ Lawyers are aware of the impossibility of erecting a completely satisfactory system of rules in which everyone may obtain justice. The public is more likely to believe that justice could be done if the judge or lawyer would only try. This accounts for the fact that, while one public image of the lawyer is as the defender and

34. Jerome Frank, Law and the Modern Mind, p. 6-7

35. Benjamin Cardozo, The Growth of Law p. 70

supporter of individual rights, another public image is unfavourable and arises through the lawyer's apparent failure to procure a just outcome for particular clients. The public has a tendency to see the system as infallible, and when it appears not to work according to public ideas of 'justice' to blame the lawyers for its failure.

Riesman suggests³⁶ that sociologists themselves 'assume, though they know he (the lawyer) may not have practiced law for ten years, that he has some magic formula for them at his fingertips; moreover that there is a formula. They are astonished to find that he, as a lawyer, is much more casual about legal matters than they are; that he goes on the principle ... that the law in any given case is uncertain. In spite of their skepticism, they are surprised, for at bottom they believe in the certainty and majesty of the law'. Informants who were anthropologists and sociologists confirm Riesman's statement that their beliefs about the law and lawyers differ little from those of the educated general public.

The advocate's place in the system is to assist the judge in decision making of a high order and in a highly visible situation. A comparison with the necessary decision making of the policeman will indicate the difference between it and the nature and importance of the court's task. The public at the greatest social distance from the legal profession may see the court simply as an extension of the police-force. One informant from the working-class who had been involved in a small court case in which he sued the driver of a motor-car and failed in his action saw his own counsel as a kind of 'enemy' within a system which started with policemen and ended in front of a judge.

36. David Riesman, *American Journal of Sociology* (1951) Vol. 1 vii p. 121

Yet for the larger part of the community it appears that the law itself is seen as a protector and guarantor of rights, and therefore that the judge or lawyer appears as often failing to implement what the public imagine the law is.

The lawyer himself knows what the law is, or, more accurately he is taught legal techniques and the system. The advocate is trained to recognise and to reconcile his role within the system, his rights and duties as officer of the court, as a member of his profession and in his relationship with his client. His training ideally should help him to avoid any possible conflicts involved in the three-fold nature of his role. A member of the criminal classes might consider the advocate's attention to his duty to the court as being excessive; some of the advocate's role-set in Scotland might claim that his loyalty to his profession could be seen to be greater than his loyalty to the system which he serves. The advocate claims, and from the evidence adduced in later chapters claims rightly, that little role-conflict arises when the technical and social training of a member of the Bar has been thoroughly accomplished. That there is occasional deviant behaviour he will admit: that the system allows corruption or that conflict or contamination are real problems he denies.

The service of the professional as Marshall says³⁷ is 'unique and personal' and yet at the same time it must be governed by known training shared by all his colleagues. Only thus can the interchangeability of colleagues be assumed as it is in this as in most professional associations. The advocate is trained to dissociate his professional from his other roles in order that his objectivity in the conduct of his cases may be as complete as is possible.

37. T.H. Marshall op. cit. p. 134

The role-training must lead to such objectivity if the system is to work. Personal involvement in the client's case is a sign of undertraining of which examples will be given later.³⁸ Roman Catholic judges and advocates must conduct divorce cases; their role as members of their Church must be completely separated from their roles within the legal system. Trade-Unionist litigants may have as their counsel High Tories; here the advocate's political role in the wider world will be irrelevant. The importance of relevance in all matters is so basic a part of the training in law that the advocate has very little difficulty in noticing and obeying his sense of what is relevant to the role he himself is playing. A Norwegian professor of the Sociology of Law has said,³⁹ 'The real significance of law to the sociologist is to be found less in deviations from found patterns than in the law itself. The legal profession applies a structured style of thinking, conceptualisation, and decision-making to the solution of practical tasks. It is interesting that these tasks apparently have persisted for thousands of years in the European tradition. And it is significant that the methods applied, and the underlying theory, have not drastically changed since the Roman Law'. This 'structured style of thinking and decision making' can be seen in the lawyer's attitude to his own tasks and behaviour as clearly as it can be seen in his tackling of a client's problems. To be partisan or to be irrelevant is to be wrong are two maxims by which the lawyer lives, and by which his actions are determined. It sometimes seems to the family and friends of a member of the Bar that over-training has been achieved. In his non-professional roles the advocate rarely loses sight of these maxims. His skills in making a point, keeping to that point and eschewing partisanship can be a great strain on those with whom he interacts outside the professional situation. His training is so successful that in

38. See p. 142 *infra*

39. Vilhelm Aubert — The American Behavioural Scientist, p. 16
 Researches in the Sociology of Law.

argument or discussion on any subject it gives him an advantage over others.

In his work role the laws of evidence often limit the information that the judge might have in deciding a case. Counsel must know and obey these laws, thus his training includes the learning of great self-control in the presentation of any argument. Even the greatest of counsel sometimes so far forget themselves in their training as to express an opinion rather than to lead evidence in support of their case. One of the most famous rebukes was delivered to counsel in this respect by the Lord Justice-Clerk in his charge to the jury in the trial of Madeleine Smith⁴⁰. 'You are not to give the slightest weight to the personal opinion of the guilt of the prisoner, which I regret my learned friend the Lord Advocate allowed himself to express. Nor are you, on the other hand, to be weighed in the prisoner's favour by the more moving and earnest declaration made by her counsel of his own conviction of her innocence. I think on both sides such expression of opinion by the counsel ought never to be brought before a jury. Neither of them are so good judges of the truth as all of you are ... As Lord Campbell said in his charge to the jury in Palmer's case - 'Gentlemen - I must strongly recommend to you to attend to everything that fell from that advocate, so eloquently, so ably and so impressively. You are to judge, however, of the guilt or innocence of the prisoner from the evidence, and not from the speeches of the counsel how ever able or eloquent these speeches may be!' The advocate's training should prevent his making such mistakes and receiving such rebukes, and it usually does. The public may expect his 'eloquence' to resound in court, and his public image may suffer from the fact that it so rarely does.

40. Trial of Madeleine Smith ed. A. Duncan Smith p. 253

That the training and socialisation of the advocate in his professional role is paramount in preventing role-conflict will be discussed further in a later chapter⁴¹ together with a description of some of the devices which serve to segregate his role and the symbols which indicate its differentiation from that of others in his role-set. The use of Merton's concept 'role-set' will be examined and in its light the advocate's relationship with his closest associates, the solicitor and the clerk, will be described.⁴²

For the client seeking advice the first link in the chain of decision-making is the solicitor or agent. The client goes to the solicitor, as does the patient to the doctor, at a time which is for him a point of crisis. His inability to understand that it is no more than an ordinary piece of 'work' for the professional must inevitably cause some disappointment on his part and an alteration or confirmation of the image he has of the lawyer. The agent may at this stage decide that counsel's opinion should be taken - in short that further expert help should be invited to assist in reaching a further decision on the matter. Counsel, having considered the case, frequently advises against litigation. The client is often more ready and anxious to test his case in Court than are his legal advisers, a situation of which the public is almost entirely unaware. The image of the advocate as a man determined to make money out of his client though it means risking the latter's wealth and property, or his good name, is one that is commonly held. It is far from the true picture. No advocate wishes to risk his reputation and face certain defeat in an indefensible cause. If the advocate decides that court action is necessary then the next decision in the matter will be taken by the judge or by the judge and a jury. Scott has described the process in *Redgauntlet* in a conversation⁴³

41. See p.226 *infra*

42. See p.191 *infra*

43. Sir Walter Scott *Redgauntlet*, p. 176

between Mr. Fairford, a solicitor, and his client Poor Peter Peebles. (It should be noted that 'Poor' in this context means that the client is on the Poor's Roll and may litigate to his heart's content without having to pay for the pleasure). Mr. Fairford says to Peebles, 'and you, who are acquainted with the forms, know that the client states the cause to the agent - the agent to the counsel - '. 'The Counsel to the Lord Ordinary', continued Peter once set agoing, like thepeal of an alarm clock, 'the Ordinary to the Inner House, the President to the Bench. It is just like the rope to the man, the man to the ox, the ox to the water, the water to the fire -'

Peter Peebles, finding as he does his greatest joy in litigation is nevertheless impatient of the law's delays and due processes. It may be said that in this respect the public image is much the same today as it was in Sir Walter's time.

The Advocate's place in the decision making is high since it is on his advice that the matter is put before a judge at all. His advice may well be wrong, but it will rarely if ever, be given in bad faith. The fact that his own reputation depends on his advice being 'learned' and good, added to his training in the ethics of his profession ensures that the client is safeguarded against the pursuit of frivolous or of unsuccessful litigation. Riesman suggests⁴⁴ that with the 'increasing psychological need of lawyers to be liked by their clients the lawyer's usefulness may be impaired'. Such need would almost certainly impair the usefulness of the lawyer's role but the writer has found no evidence of it in her investigation of the Faculty of Advocates. As Riesman himself writes earlier in the same paper:⁴⁵ 'Hence, is the lawyer

44. Riesman, op. cit. p. 131.

45. " op. cit. p. 128.

something of a scapegoat? ... what does distinguish lawyers in this role is that they are feared and disliked - but needed - because of their matter-of-factness, their sense of relevance, their refusal 'to be impressed by magical 'solutions' to people's problems.' The advocate's usefulness to his client as a 'man learned in the law' is of far more relevance in the discussion of the counsel-client relationship than is any consideration of either 'liking' or 'disliking' the other, at least in the situations examined in Scotland.

Finally, in the advocate's role-set the judge must be considered. Little has been found to say on this matter because the system so clearly structures the judge's role in relation to the advocate, and the training for the roles is the same bearing a similar relationship to the legal system they both administer. As has been explained⁴⁶ all the judges of the Court of Session have been practising members of the Bar. They have been 'on the floor' of the Parliament House for many years and know the function, the role and the norms of the advocate. They acquire new skills in decision-making with their elevation to the Bench, but these skills are closely related to the same system within which their skills as advocates were acquired. They have the same rationality, matter-of-factness and sense of relevance on the Bench as they did at the Bar. Their duty is to be impersonal and objective and to dissociate their role as judge from their other roles, just as is the advocate's duty. In the ideal system the advocate and judge are partners in arriving at a solution which is just in relation to the law.⁴⁷ 'To the Court, for example, he (the advocate) owes the duty to disclose all relevant authority. For long there was some uncertainty as to how far this duty went. But, since a

46. See p. 69 *supra*

47. Glebe Sugar Refining Co. v. Greenock Harbour Trustees, 1921 S.C. (H.L.) 73 at pp 73, 74.

Judgement of Lord Birkenhead's in the House of Lords in 1921, the legal, and I think the moral, duty is quite clear. Lord Birkenhead's words were these:⁴⁸

'I think it right to make this observation at once. It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are, therefore, very much in the hands of counsel and those who instruct counsel in these matters, and this House expects, and indeed insists, that authorities which bear one way of the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this House in the capacity of counsel'. The Advocate's duty is stated here clearly: it is to assist the court in arriving at a just solution in law.

The late Sir Randall Philip, a distinguished Q.C. of the Scottish Bar, goes on to say that the art of advocacy⁴⁹ 'centres round the advocate's relation to the judge'... Unlike most public speakers, the advocate has repeatedly to address 'the same judge or Court. The personality and mental outlook of the one becomes only too well-known to the other. Much therefore, depends on the counsel's general reputation for reasonableness. If that stands high, then the Bench is more likely to understand his persistence, and the client also more likely to understand when he deems further persistence unavailing. There are two cures for the advocate's own foibles. The one is advice from an elder friend at the Bar. The other is, some personal experience in a judicial capacity

48. Ibid.

49. J.R. Philip, The Art and Ethics of Advocacy p. 6-7

himself, even if only for a day.' The advocate is frequently in a position to acquire this experience as an Honorary or Interim Sheriff at any stage after the earliest years in his career and as a Sheriff-Principal almost always before he himself is appointed to the Bench of the Court of Session. The judiciary and the Bar know the system, having been similarly trained and are likely to play the roles allocated to them in so far as their capacities permit.

The most important members of the advocate's role-set, the clerks and the solicitor, and their relationship and interaction with him are discussed later.⁵⁰ Their roles have developed, as has his, with great specificity within the system. Any idea that these roles are diffuse has been destroyed by the examination of the growth of the system. Its complexity calls for expert, specific functions and roles, and its needs have been met in the pattern that can be observed in the Parliament House today. This small group of expert professionals, trained to administer the law within a clearly structured system are unlike any group of workers described by anthropologists or sociologists in the Western world. That they are a community with a geographical locus makes them unique; that the development of their professional norms and functions has been gradual and clear has been seen in the description of their history.

The public in Scotland may today be barely aware of the exact meaning of the word 'advocate'. The advocate has nevertheless the monopoly of practice in the highest courts of the land and has enjoyed for many centuries the top professional ranking in his country and the many privileges that go with such ranking.

50. See Ch. 8, infra

It is difficult to see the Scottish advocate in David Riesman's analysis of lawyers. For example, he states: ⁵¹ 'The law has a long tradition of rationalising ... by an ethic of 'invisible harmony' which assures each practitioner that if he fights hard for his client within the rules the general interest will be somehow advanced. Though obviously the matter is very hard to document, it appears that this ethic is breaking down and that lawyers consequently feel either the need to be partisan or to be iron-clad cynics'. It is perhaps easier to 'document' in this small group of Scottish advocates, but such a conclusion as Riesman reached could not be drawn from the evidence presented. The training, both technical and social, that the advocate undergoes is specifically and successfully directed to helping him to avoid these pitfalls. Of all the citizens of his country he is most carefully taught not to be 'partisan' and most unusually he appears to avoid cynicism. The American lawyer as described by Riesman, ⁵² Singel, ⁵³ Morsky, ⁵⁴ and others appears to have little in common with the Edinburgh advocate. The latter's rigid training for his specific role and his life in a small and homogeneous society will be discussed and it is hoped will demonstrate an unusually high degree of role specialisation and lack of conflict or of contamination in the playing of the ⁵⁵ role.

51. Riesman, op. cit. p. 131

52. Riesman op. cit. passim

53. Erwin O. Smigel, Interviewing a Legal Elite. The Wall Street Lawyer, passim

54. Charles A. Morsky, The Washington Lawyer, passim

55. See Chap. 9 infra, also p. 134 supra

Chapter 6

THE STATUS AND ROLE OF ADVOCATE

Social Standing in General

The Faculty of Advocates in Scotland provides an excellent and possibly unique example of role-segregation. The professional group is very small (approximately 108 in actual practice and approximately 300, if one includes those who no longer practise but have retired or moved on to some other professional activity - usually legal and most often judicial - for which membership of Faculty provided the entrée). To some extent those who no longer remain in practice nevertheless participate in the corporate life of the Faculty. Advocates as a professional group are, moreover, geographically and as a work group immobile. As has been explained, Advocates have a monopoly of practice at the bar of the Supreme Courts in Scotland which sit in Edinburgh, so that only when the Justiciary Court is on circuit, or if an advocate is briefed to appear in a lower court or local inquiry or similar tribunal does his work in Scotland take him out of Edinburgh. He cannot practice as an advocate out of Scotland (except before the House of Lords, Privy Council or at a Parliamentary Enquiry). Apart from a very few posts still open to advocates in the Overseas Legal Service, and some appointments in Industry, the Scottish advocate, unless he has private means and need not work at all, must live and work in Edinburgh. Both at Parliament House (the seat of the Supreme Courts) and (in most cases) at his home in the New Town, he is in daily contact with his peers and indeed with the larger part of his role-set. The Faculty, then, is a group, isolated (in a sense), immobile, close-knit and virtually entirely recruited from the more - but not most - privileged classes in Scotland.

The professional status of advocates is not open to question. Dr. Fox in the 'Lancet' has suggested that ¹ 'A profession is a group of people united by sharing two things (1) a body of knowledge, which they try to increase and transmit to new entrants; and (2) a code of ethics which they try to follow in their work.' This seems to be a somewhat inadequate definition, especially where it isolates and stresses the tradition of a body of knowledge, which is a phenomenon encountered in other occupations not recognised as professions. More important seems to be the special relationship of trust owed by the professional man to his client and his responsibility to the self-controlling corporate body which has admitted him to membership. The advocate owes these duties not only to his client, but, as already explained, a duty to the Courts before which he practices. This is so clearly recognised that his word will be accepted without question.

² Surveying the 'professions' Carr-Saunders and Wilson have noted certain characteristics which are typical in general. Legal techniques were among the few round which professions could be built in the Middle Ages, when there was a pronounced impulse to association, which later became a powerful instrument for the safeguarding of privilege. In most cases, they observe, regulation by the State supervened to control professional associations by granting privileges corresponding to duties imposed, and by prescribing rules for registration, admission and expulsion. A professional association regulated by the State to some extent loses its freedom. The Faculty of Advocates has been subjected to very little State control. The College of Justice, of which the Advocates form part, was erected by Bull of Pope Paul III dated March 1534 and confirmed by Act of Parliament in 1541, and, though there are some early statutes affecting advocates, State intervention has been minimal, and even Acts of Sederunt

1. 13 October 1956

2. The Professions p. 298 et seq

(delegated legislation promulgated by the Judges) have not been used as formerly in modern times to affect the freedom of the Faculty. Until the introduction of Legal Aid in Civil (1949) and criminal (1964) cases the State's only direct interest seems to have been to collect stamp duty from intrants. The private Act of George IV prescribing contribution to the Advocates' Widows Fund was not so much imposed on as requested by the advocates themselves. Participation by the Faculty of Advocates in a State supported legal aid scheme was received with considerable suspicion at the outset, but most advocates have come to accept it, and the post-1949 intake no doubt regard it as in the natural order of things so far as civil cases are concerned. The effects of the 1964 extension of legal aid to criminal cases cannot be evaluated so close to the event. Provisionally it could be suggested that acceptance of money from State sources diminishes the professional independence of advocates to some extent, and may tend to promote a less scrupulous attitude to litigation than hitherto, when the client alone provided an advocate's fee, if he were to receive one at all. The present writer, however, hopes to show that the status of the advocate has not as yet been affected by state legal aid and that his role playing is unlikely to change owing to his rigid training and to the nature of the group in which the role is played. Legal aid, it may be stressed, is available to people of moderate means, and they may be called on to make a contribution. The relationship between counsel and client and counsel and solicitor is not comparable with the old 'Poors Roll' which was a benevolent service offered free to the least privileged.

Admission, expulsion and testing of professional competence are all controlled by the group itself, though the Faculty does not itself organise academic professional training.³ Ultimately the Faculty's privileges do not depend on

3. See pp.90,227.

state protection, but on the norms of the legal profession itself which protect the monopoly of the advocate's role and the exclusive nature of the profession. Similarly norms of discipline and professional ethics are not imposed by the State or by any outside body, but are evolved and enforced by the group itself, usually by informal and highly effective sanctions which will be described throughout the text. The law, however, recognises the secrecy or confidentiality of the advocate client relationship as essential for the proper discharge by the advocate of his highly fiduciary function. Thus at practically every point the Faculty as a profession appears to be a 'mystery' which only the initiated can fully comprehend. The public, the State and even other branches of the legal profession are kept at a distance, to ensure the proper fulfilment of the advocate's role as the Faculty conceives it.

On admission to the Faculty of Advocates an inrant acquires a certain status irrespective of such qualities or skills as he may have beyond those which are prescribed. An accident of national history established the legal profession in Scotland as the career of highest prestige available to a Scotsman in his own country. Those of greater personal ambition had to pursue it outside Scotland. This applied not only to the socially mobile professionally, but also to those who had inherited the highest social status, and who for social or political reasons gravitated to the Southern metropolis, soon after the Union.

Recruitment

Recruitment for the professions has been the subject of several studies,

notably perhaps those of Merton and Goode,⁴ but none has been concerned with so closely knit a profession as the Faculty of Advocates, where social selection is a very important consideration. The various studies have stressed socio-economic position, ethnic and religious affiliations and sex as the three principal considerations determining who will enter a particular profession. In the case of the Faculty, socio-economic position is obviously of great importance. Philipson has traced the changes in the social composition of the Faculty up to 1850⁵ and has noted the virtual disappearance by that time of the aristocracy from its ranks. In the course of the 19th century the landed element in the Faculty diminished; an increasing number of intrants had their wealth based on urban industry and commerce and had no claim to a territorial designation unless they purchased an estate.⁶ During the present century recruitment has mainly been from the sons of the professional classes, notably advocates, solicitors and ministers, and from the commercial middle class. The initial cost of admission and precarious prospects of earning a livelihood in the first years of practice have tended to deter those of limited resources. As formerly with the Foreign Service and the Brigade of Guards low initial remuneration operated (and to some extent operates) as a social check on admission. This is clearly a factor giving great prestige to the status of advocate. In modern times, however, there has always been a proportion of the Faculty intake who have first established themselves as solicitors or have sufficient confidence in their talents to back them with limited private means.

-
4. Their definitive study (with Mary Jean Huntington) The Professions in American Society is not yet available, but some of its ideas are discussed in Cheetham The Legal Profession, by R.M. McFarlane (6th Feb. 1958) in a paper on the Recruitment and Training of Professionals.
 5. M/S unpublished.
 6. P.G.B. McNeill 'Judicial Titles in Scotland' 1964 S.L.T. (News) 105

Ethnic considerations affect recruitment in an unusual way. Almost all intrants are Scots, and, though there is no discrimination against other nationalities, few other than Scots apply. It may, however, be noted that, though the Faculty is virtually entirely Scottish in recruitment, a substantial proportion, and a very influential minority, are culturally anglicised or have been exposed to anglicisation through public school or Oxbridge education before qualification for the Scottish Bar. There is, moreover, a fashion for judges or advocates who have not themselves this background to provide it for their sons who follow them in the Law. The anglicisation of the Scottish middle classes has been progressive since the mid nineteenth century, and in few fields, if any, can the consequences have been more significant than in this small and influential group, which, essentially Scottish by birth or domicile and by residence and jealous of the traditions and privileges of the Faculty, yet is jurisprudentially (through the House of Lords) and through education largely orientated towards London. Significantly, however, it is from among the cultural repatriates that the main contenders for the Scottish legal tradition, have emerged. This in different contexts is a recurrent phenomenon in Scottish history from the time of the Bruce. London, which until recently, had virtually neglected the problem of establishing centres of legal education overseas, had established a virtual monopoly of legal training and recruitment for Commonwealth lawyers through the Inns of Court and English Bar Examinations. There is at present only one coloured - Malawi - member of Faculty, and great efforts were made by his brethren to encourage him in his ambition to be called to the Scottish Bar. He had been influenced by a Church of Scotland minister in his own country. Recently the Law Faculty of Edinburgh University has entered into a special arrangement with the University of Basutoland, Bechuanaland and Swaziland to train lawyers who can

no longer look to the Republic of South Africa for training in Roman-Dutch law, a close analogue to that of Scotland. It is not anticipated that the ethnic polarity of the Scottish Bar will change.

Regarding sex and religion, as has been noted in the ethnographic presentation, the Scottish Bar, though open to, does not in general provide reasonable prospects for women. In the past many members of Faculty have been closely associated with the main branches of the Christian Church in Scotland, and this is still true of the elder age groups. Though not discriminated against by the Advocates' profession itself, few Jews have in fact been admitted to the Faculty. The first, admitted in 1956 and now on the Bench, proved a popular and highly respected member of Faculty throughout his practice. The admission into Faculty of intrants of Irish-Roman Catholic background came late, reflecting the slow rate of integration of Irish immigrants into the Scottish population and economy, especially in the higher social and economic strata. Few of this background have yet achieved positions of highest prestige in the Faculty or on the Bench of the Court of Session, the culmination of a highly successful forensic career. It is possible that the solicitors' branch of the profession has proved less liberal in its attitude to sex and religion than has the Faculty itself.

What, it may be asked, determines the decision to enter the Faculty of Advocates? Merton and Goode⁷ are of opinion that when a researcher asks such a question in relation to a profession he is asking the person interrogated something which he does not know himself. One leading Scottish legal figure certainly knew although his reason for becoming an advocate was unusual. As a young man he was heard to remark: 'Well, they wouldn't take me in the Army so I had to come to the Bar'. Socio-economic background, ethnic and religious affiliation and school education are important factors and are usually relevant.

7. see note 4 *supra*

The educational requirements for entry into the Faculty of Advocates⁸ are moderately high, but within the range of attainment of most of those who would qualify for admission to a Scottish University in present conditions. Leading advocates have frequently in their training proved most promising law students in their Degree course, but this is not invariably true of many who have made successful professional careers at the Bar. Given health and personality, and in some cases by supporting a political party, the advocate of moderate intellectual talent may rapidly overtake those of greater academic promise and reach the Bench of the Court of Session, for which continuous practice until appointment seems now to be indispensable. The present Bench comprises judges whose degrees lay at the opposite ends of academic distinction. The public image of a profession is also important. The present writer has discussed the question with a substantial number of advocates and also with those who, as law teachers over many years, have had opportunity to form an opinion of a considerable sample group. Apart from the very important factor of 'self recruitment' for the Faculty, the main considerations influencing decision would seem to be socio-economic and 'public image'. Though the Law Society of Scotland is at present conducting what is in effect a recruitment campaign for solicitors, of whom there is a shortage, the Faculty has never consciously resorted even to indirect self-advertisement. For centuries the attitude seems to have been that there are more advocates in Edinburgh than opportunities for full employment. (This situation may alter with the introduction of legal aid in criminal cases, but with legal aid generally and prospects of making a livelihood much sooner than formerly, may stimulate recruitment in

8. See p.90-1 supra

the next few years). The socio-economic factor has, with rare exceptions, been determinant as to whether an individual would consider the Faculty as a career. The 'public image' especially for the young man or woman is often misleadingly romantic and cast in terms of the forensic battle. Some disillusionment may supervene at the stage of legal education when the student is confronted with the 'tougher' subjects and with aspects of law which offend his logical or moral faculties. When the intransigent becomes a 'devil' he tends to discover that the really lucrative aspects of practice are those which have little popular appeal and may not involve appearance in Court. After the natural excitement of appearing in a few criminal trials, undefended divorces and jury trials in damage claims, the original magic which determined decision is radically revised.

By this stage, however, there has come strongly into operation 'socialisation' or role acquisition, learning the role to be played and learning it in terms of others' expectations, especially those of others in the legal role set. The initiate, in short, learns to think as an advocate and to reorientate his general attitude to the extent that, for those who will go furthest in the profession, a highly technical legal point gives metaphysical satisfaction. George Herbert Mead⁹ has suggested that learning to play a role is 'much like learning the rules of the game' and has indicated how these rules are internalized and structured into the personality. Further Talcott Parsons has introduced¹⁰ the concepts of 'imitation' and 'identification' to assist understanding of the process of role acquisition. Ellsworth Farris¹¹ has considered the same problem in terms of 'conscious imitation' and 'imitation'.

9. Mind, Self and Society p.

10. The Social System

11. 'Imitation' (1926) XXXII A.J.S.

Studies by Homans,¹² W. Foote Whyte¹³ and Becker and Carter¹⁴ have indicated how norms and attitudes develop through constant interaction and how in consequence 'closed' groups develop because of common interests and attitudes. This is particularly true of the Faculty of Advocates. To some extent this process of 'socialisation' begins to operate at the University stage of legal education, becomes more influential when practical training (or 'devilling' is undertaken and continues after the young advocate is admitted, since much still has to be learnt in the actual course of practice.

Associated with this process is the acquisition of the language or 'jargon' of the profession. Every profession or academic discipline has its jargon, which for the initiate is a useful 'short hand' for expressing complex technical ideas. This technical language will first be encountered in law classes at the University. It may be suggested moreover, that with the lawyer as with the clergyman, a professional manner of expression and attitude to conversation or controversy tends to indicate his profession even in private non-professional association. Whatever his previous background, the individual comes to bear the distinguishable mark of 'advocate'. So far, the discussion has primarily concerned the decision made by the 'outsider' to seek admission to Faculty. The 'self-recruitment'¹⁵ element is, however, of particular importance. As explained¹⁶ sons tend to follow their fathers in the law, and a substantial proportion of the Faculty intake has always been in this tradition. These have or should have, a clear idea of what is involved and do not rely on a distorted public image. Beyond the limits of what could strictly be described as 'self-recruitment' - i.e. sons following fathers as advocates - other

12. The Human Group

13. Street Corner Society

14. 'The Development of Identification with an Occupation' (1956) 1 A.J.S.

15. see p. 153 supra

16. see p. 87 supra

intrants may be expected to be partially initiated. It might be anticipated that sons following fathers as advocates would climb more rapidly to the highest places in the profession - the Bench of the Court of Session. This does not seem to be established by modern trends.¹⁷ On the whole the sons of judges of the immediately past generation have been content with the moderate success of appointment to the Shrieval Bench.

Almost as prepared for the role of advocate as the son of an advocate is the son of a solicitor - who having operated as part of the role set is aware of what is expected of others with whom he interacts professionally. A career at the Bar carrying as it does higher prestige, is often suggested by a solicitor to his son, not infrequently with conscious or subconscious envy associated with the realisation that, given the socio-economic background, the father would have considered himself no less suited for such a career. A family connection with a firm of solicitors has been one of the most useful assets for a young advocate at the outset of his professional career.

Again, especially in Edinburgh, many families of the socio-economic group from which the Faculty is recruited are on sufficiently intimate terms with members of the Bar to ensure that they, or their sons on the threshold of a career, will have a fairly clear idea of what is involved. Sons of ministers of religion have always been prominent in recruitment for the Faculty. Though in economic terms the minister is now not on terms of equality with the lawyer, his status to some extent is assured by tradition as middle middle class, and the interaction between Church and Law has been, and to some extent is, a special phenomenon. It may be of decreasing significance in the general context of modern life, but within the social network in which both operate in

17. cf. p. 27 et seq. supra

Scotland today, its significance is greater than in the national life as a whole.

The economic or financial factor in determining to seek admission to the Faculty is complex. It has, generally speaking, been true in the past that without private means or support few could venture on a career at the Bar. Carr-Saunders and Wilson¹⁸ discuss and condemn the element of 'exclusiveness' in the profession which may shut men out on grounds other than failure to attain proper standards of competence. The exclusive factors include any period of enforced waiting which does not involve training to acquire proficiency, a period of pupillage which is not efficiently organized so as to be as brief as possible, premiums exigible on entry to the profession and annual subscriptions. So far as the Faculty is concerned, there is no equivalent of 'keeping terms' by eating dinners as at the English Bar, but the 'idle year' which must be spent before admission may be an exclusive factor. Designed to purge a prospective advocate from contacts with trade or solicitors' practice, this year is profitably and necessarily spent by young intrants in 'devilling'. The same restriction, however applies to older men, such as solicitors who have had many years experience of the law - even in the Parliament House - but have not been indoctrinated in the norms of the Faculty itself. The Faculty has declined to relax its rules so as to enable solicitors to transfer immediately from one branch of the profession to another. Annual membership subscriptions especially for newly admitted advocates are very reasonable, but the initial dues of approximately £450 may well be the highest of any profession in Britain, and are certainly

18. The Professions p. 381 et seq

resented by a number of lawyers who have been deterred from seeking admission because of the initial outlay involved. Part of this outlay is required by the Statute II Geo. IV C.41 and the rest on Faculty resolution. For the return in services and facilities the Faculty dues are reasonable, spread over a number of years, but they provide a serious obstacle for a man who is not earning and has no private means. Apart from the initial payments which an intrant must make¹⁹ the considerations which formerly governed the situation do not apply to the same degree. Grants are available for a University degree carrying a professional qualification and legal aid makes it easier than formerly for an advocate to earn a livelihood within a few years from admission. An able advocate should be self supporting after two to three years practice. It may well be that the subsidising by the State of all but the leaders at the Bar (who are busy enough to practise outside the Legal Aid Scheme) will diminish the prestige of the profession generally and increase the esteem of the few.

It is probably true to say that very large remuneration which usually confers high status, has not been an inducement to recruitment in the case of the Faculty of Advocates. The status conferred by membership does not have money as its symbol. Those who have sought the financial glittering prizes in Birkenhead's phrase have tried their fortunes at the English Bar. The fabulous fees commanded by men such as Stafford Cripps, Gerald Gardiner, Patrick Hastings or Wilfred Greene in England, were the subject of legal and general gossip and speculation. This seems to have no counterpart at the Scottish Bar, though the remarkable earnings of some Scotsmen such as Erskine at the English Bar in past generations were much talked about. The widow of one exceptionally successful Scottish advocate has donated his fee book to the

19. See p. 91 supra

Faculty as a record of the accelerating financial success of an advocate of exceptional talent. The later very large earnings were, however, largely as a result of practice in England at the Parliamentary Bar.

It seems probable that some of the most successful advocates in practice earn more than the most successful solicitors in Scotland, but these solicitors (who are more numerous than the practising Bar) earn more than all but the leaders of the Bar. Yet this does not alter relative status. The average earnings of the established advocate certainly exceed those of the average solicitor counterpart. It has been estimated²⁰ that the average reasonably conscientious solicitor aged 30 - 34 earns £2,000 per annum and at the age 55 - 64 earns £3,000. At 64 the upper quartile earns £5,000 and the median £3,500. An advocate who decides not to remain in practice, in the hope of elevation to the Bench of the Court of Session, may reasonably expect to be appointed Sheriff with a salary of over £4,000 even at the lower grade plus non-contributory personal and widow's pension rights. The most successful advocates accept a substantial reduction of income by accepting a seat on the Bench of the Court of Session with a salary of £6,600 (Lord President £8,000). The drop in income is compensated for by an increase in prestige. Whether commercial and industrial leaders would share the legal profession's own estimates of relative status vis-a-vis themselves is doubtful. They are accustomed to employing experts and to evaluating them in terms of efficiency and income.

The attraction of the Scottish Bar has not, it is thought, been very high remuneration, but largely because within the community where the advocates' role is worked out his status commands high prestige; and because each performs his role as an individual, rather than as a member of a partnership, organisation or Government Department, the successful by their performance command

20. John Graham 'The Scotsman' 150 16th Feb. 1965 adjusting figures set out in the Report of the Royal Commission on Doctors and Dentists Remuneration 1960 (i.e. 1955 figures) and using those supplied in a Law Society of Scotland Survey, 1960.

particular esteem especially within the professional role set. There is in addition the attraction of becoming part of a closely knit and exclusive group in which professional and private roles are both involved.

The Advocate's Role

As has been demonstrated already²¹ until well into the nineteenth century the role of advocate assumed the rendering of 'inestimable' services by a privileged section of the community, i.e. services which could not be evaluated in money. Advocates were gentlemen of private means who offered their services without the primary object of making money, though some might in fact prosper by the honoraries they received.²² The real rewards of the advocate were prestige and influence often political. Though the Faculty no longer comprises many advocates of independent means, the ideal professional image is influenced by the past stereotype, e.g. in the rule or custom that no action may be brought for fees.²³ To-day an advocate himself and his family are very much concerned with what he earns, but, restricted as he is by the rules against advertising and by other norms, the public image of his role is not that of a money getter. Commercialism is the antithesis of the professional image, both its public image and its stereotype of itself. Moreover, the advocate's role as presented to the public is that of a professional offering liberal services of a unique and personal kind. The advocate does not only give forensic skill, but offers his whole personality, a personality which has partly been formed by training in skills, but also, and perhaps more importantly, by the tradition and ethics of his profession. His ideal role, in the public image, is to do for his client what the client would wish to do

21. see p. 104 supra

22. cf. Marshall Sociology, at the Crossroads p. 151 et seq

23. see p. 104 supra

if he knew the law, and were also a man of absolute integrity. The client, unlike the customer is not always right, and an advocate has complete control over the presentation of his client's case while his mandate is unrevoked. Accordingly, except perhaps for a few 'actor advocates' appearing in criminal or jury trials who may manifest some flamboyancy or eccentricity of manner, the advocate must maintain at least the facade of a respectable private life as well as exhibit a public life beyond reproach. The norms of professional behaviour which maintain the public image go substantially beyond the minimum required to maintain professional competence in the sense of technical skill. Certain standards of public responsibility and private conduct are regarded as necessary for the adequate discharge of the professional role.

It is, of course, an oversimplification to think in terms of the public image of any profession. The stereotype may alter with time, through social and economic change, by the emergence of other professions or by the shedding of part of an accepted role. Public image will be differentiated to some extent by age, sex, education, occupation and social distance of the evaluator. Thus the public image of the profession of advocate may be very different for the young man considering entering it, on the one hand, and the hire purchase financier who has considerable experience of litigation on the other. Merton²⁴ Goode and many others have noted that 'images increase in complexity, detail and variability and decrease in clarity as between individuals or groups with an increase of direct contacts with the profession.' Few members outside the profession of advocate have the same amount of contact as with (say) the family

24. See e.g. Social Theory and Social Structure p. 376

doctor, schoolmaster or solicitor. In general, therefore, the public image of advocate is fairly uniform and definite, and this stereotype structures the advocate-client relationship in particular.

Thus the first contact between advocate and client is strictly structured. The client in difficulty or distress brings his problem for solution. This problem, even if it has a technical content, will frequently involve his private life in some way and the factor of personalities in the relationship is important. Absolute confidentiality protects communications between counsel and client. The advocate's status is professionally middle-class, while the client may be of any class. In all cases, however, the client is expected to show deference and respect for the advice offered, and the advice is given with authority. Whereas the client is often deeply involved emotionally, the advocate for the proper discharge of his role must be emotionally neutral and his training is directed to making him so. He is concerned with the facts of the case and the technical solution of any legal problems involved. He may consequently have to advise the client against the latter's strongly held preconceptions or views of his rights. The advocate's function is fiduciary in character and he is not employed to secure the result which his client desires. (It is not irrelevant, however, that, if an advocate is given a problem for his opinion, he wishes to know the interest of those on whose behalf it is required). An advocate is bound to accept a brief for any party who retains him unless he is retained by the other side. In Court the advocate stands out obviously as the champion of his client's case, and will be held in esteem if he succeeds. Should he fail, however, the task of explaining what went wrong will be left to the ingenuity and tact of the instructing solicitor. An advocate is not called on to rationalise his failures, nor indeed can he be sued for professional negligence.

Marshall²⁵ concludes that, despite faults and deficiencies in the professions, professionalism is an idea based on the real character of certain services. 'It is not a clever invention of selfish minds.' In short the public image does, in fact, reflect the professions' concepts of their own ideal role. He asserts also that the individualistic bias of the major professions was the product of circumstances and is not of the essence of professionalism. Stimulated by external pressures, and reacting to these, but also making contributions of their own, the professions 'are adapting themselves to new standards of social service'. So far as the Faculty of Advocates is concerned, as has been observed, no State organized social service of legal representation exists comparable, for example, with the National Health Service. On the other hand, most advocates are willing to appear under the legal aid schemes which provide for a state guaranteed but restricted tariff of fees. This may modify the traditional stereotype of the advocate to some extent. Though there was talk of 'socialism' within the Faculty when the scheme was first introduced, in fact there is no state interference with the advocate's role. Even though there may be a general trend for the professions to be socialised and the social services professionalised, this trend has had little impact upon the Scottish Bar.

The public image of the advocate has perhaps lost more in prestige in the assessment of an influential element of the community. The leaders of industry and commerce are accustomed to employ experts of all kinds, and are not necessarily deferential to the mystique of the advocate's role, more than the role of an accountant, engineer or research chemist. In the first place, advocates in Scotland unlike barristers in England do not specialise in particular branches of law such as mercantile law or taxation, and few are therefore

25. op. cit. p. 166

likely to impress deeply the leaders of the business world who have had dealings with the specialist experts in London or prefer arbitration by commercial men. In Scotland the experts in commercial law are frequently specialist solicitors rather than advocates. Secondly, the concentration of economic power in the South has resulted in a drift from Edinburgh of much of the most prestigious and remunerative legal work; in particular mercantile and maritime work and taxation, has now gone to London. It has been estimated that 80% of all concerns in Scotland employing 200 or more persons are controlled from outside Scotland.²⁶ Much of the work which employs the Scottish Bar today is, compared with 50 or 100 years ago, of ^{little} intrinsic legal interest or difficulty. Thirdly, even within the country a considerable amount of work which was formerly exclusively within the lawyer's province has been taken over by other professions, such as Chartered accountants. On the other hand, through Commissions of Inquiry, which are very often presided over by senior counsel employment of the Bar has probably increased over all - especially as many interests may have to be represented at such inquiries.

The altered character of the business of the Courts may well have affected the image of the Bar from the solicitor's viewpoint. It is apparent to him that no exceptional skill is required to conduct divorce or reparation work such as actions of damages for personal injury nor to present local or particular interests at inquiries. Advocates cannot expect to command special esteem or prestige from solicitors who consider that they could handle the work as competently themselves. It is a tentative assumption, based on a limited number of opinions that what could be described as 'jealousy' of the Bar is more apparent among solicitors outside Edinburgh, especially in the West of Scotland, than in the Capital itself. The monopoly enjoyed by the Bar in divorce actions

26. T.B. Smith 'Legal Imperialism and Legal Parochialism' 1965 Jur. Rev. (galley proofs).

and civil jury trials would be difficult to justify by convincing arguments. The strongest argument suggested is usually that this work provides training and subsistence for the small group of advocates, and that without it a strong Bar conducting cases before the higher courts could not be maintained. The leading silks and juniors who plead in the more complex and legally important type of case do certainly command prestige and esteem from the solicitors, but general deference to the Bar is not as great as formerly.

There is a determined and vocal element among Scottish solicitors which would favour 'fusion' of the legal profession, a step which would deprive the Faculty of Advocates of its monopoly, and allow firms of lawyers to comprise both 'chamber lawyers' and court specialists as in Australia and the United States. Increased contacts between Scottish lawyers and others of the Commonwealth may have stimulated that attitude, and also the fact that the academic legal training of advocates and solicitors is now largely assimilated. Some would go further and seek fusion between the Scottish and English legal professions, and complain that a Scottish legal qualification alone restricts unduly the range of professional mobility. It may safely be assumed that the Faculty of Advocates would resist any such fundamental challenge to its privileges, and not even the most radical Lord Advocate would be likely to associate himself with legislation to destroy the Faculty, the group to which he owes a special loyalty. Though the aristocratic element in the Faculty is now negligible it includes besides those from middle class and professional backgrounds a few from working class and lower middle class origins. The Faculty's interests would be defended by its 'political' members no matter what government was in power. Further, the traditions, professional solidarity and influence of the Faculty are powerful factors, giving it strength out of all proportion to its numbers. The part which the Faculty itself and its individual members have played in the national life, and the fact that, as part of the College of Justice, it has enjoyed special protection under the

Union Agreement would deter most governments from encroaching on its privileges or even subjecting them to the scrutiny of such a body as a Royal Commission. Certain privileges would be difficult to defend, such as the heavy dues imposed on entry and monopoly of certain types of work. On the other hand, the independence, individuality and integrity of the advocate's role could scarcely be preserved as they have developed if the State intervened to regulate a profession whose roles and norms have developed essentially by the corporate sense of responsibility and privilege of the group itself.

The stereotype of the advocate no doubt does not appear the same to the public and legal profession in Scotland, Edinburgh in particular, and to the observer in London or New York. Unlike most other professions that of advocate is restricted to Scotland. Some advocates leave practice to act as legal advisers to large British concerns or to teach in Universities outside Scotland or (in the past) took up appointments in the Colonial or Overseas Legal Service. Those who remain in practice are limited in their professional life to appearing in the Scottish Courts, except for occasional appearances in the House of Lords or more rare even before the Judicial Committee of the Privy Council. Lord Macmillan as an advocate was one of the few to be successful and command high esteem at the Parliamentary Bar. Scottish affairs are seldom of interest to London, and so far as legal matters are concerned really only impinge when a House of Lords decision may influence English law. In a number of the most important Scottish cases of this kind, such as Revenue cases and the recent very important ²⁷Burmah Oil Case English counsel have often

27. Burmah Oil Company v. Lord Advocate 1964 S.L.T. 218.

been brought in to reinforce those from Scotland. Even in opinion work, especially Revenue work, this also happens. The fees earned by specialist English counsel are very much higher than Scottish counsel normally earn, and this to some extent reduces the esteem in which the Scottish Bar is held. The designation 'advocate' is unknown in English legal circles, and indeed the popular press ^{rarely} uses it even in Scotland. The designation 'Q.C.' is, however, familiar in England, and it is generally assumed that the Scottish Q.C. is the equivalent of the English Q.C., though cheaper. In short the prestige and esteem in which an advocate is held are high in Scotland but would not rate high on a United Kingdom rating. If most Englishmen and many Scotsmen are unaware of the differences between the two legal systems and legal professions, except vaguely perhaps that the Scottish is a provincial version of the metropolitan with a few peculiarities, the foreigner is probably seldom aware of the existence of the Faculty of Advocates at all. His dealings with the law of Scotland are often conducted through London agents or with firms of solicitors in Scotland who deal with commercial and trust matters or rights of succession to property. The general English and international image of British life is that of London, and this is very largely true so far as the stereotype of the legal profession in Britain is concerned. It is far from accurate as an image of the Faculty of Advocates.

Most other professions in Britain have mobility, and their roles may be evaluated with reasonable accuracy by the British public in general. However desirable it might be theoretically to compare the Faculty of Advocates with other professions, its unique character defeats the making of useful comparisons. In a series of nine articles published in the Scotsman between 13-23 Feb. 1965

John Graham analysed and discussed the earnings of the professions in Scotland in 1964. Actuaries and doctors were shown on average to earn more than solicitors, but solicitors appeared to have had a profitable time over the past ten years, median earnings for the age group 30 - 65 being in the region of £2,700 p.a. The author discerned a trend for a levelling off of professional earnings over the next five years, the general expectation being in the region of £3,000 p.a. So far as those figures may be relied on and so far as income provides an index of status, it may be said that the average advocate's expectations, whether in practice, or in employment for which membership of Faculty qualifies, are certainly greater than those of average solicitors. In fact, however, as Carr-Saunders and Wilson asserted in 1934²⁸ information on most professional incomes is meagre. Some people in a profession may earn very large incomes and others very little. This scepticism regarding 'income information' remains largely justified despite the evidence summarised in the Report of the Royal Commission on Doctors' and Dentists' Remuneration in 1960 and despite John Graham's researches in 1964 which were largely based on it. No true picture of remuneration at the Scottish Bar can be gained from the Report because of the smallness of the sample, nor is the information available from other published sources. The general living standards and dress of advocates indicate reasonable prosperity without ostentation, though, especially with advocates at the outset of their professional careers or on taking silk, there may be simulation of greater prosperity than is actually enjoyed. In Scotland most of those outside the group would accept that the prestige of the profession of advocate ranks above solicitor and that of solicitor near the top of the status ladder. Perhaps only the

28. The Professions - reprinted 1964 - p. 460

leaders of the medical profession rank equally, and the self image of the Faculty would probably not concede equality.

Time may well change, as in the past it has changed already, the image. To some extent the present evolution depends on historical considerations including inherited status from the social position of the most influential and well known advocates of an earlier era. As defenders of personal liberty and of those accused of crime, advocates in discharging their role appeal to the public imagination though, of course, the most successful advocates may not engage much in the type of case which the press reports. The professional techniques of the Bar do not demand exceptional intellectual qualities or training more arduous than that required for most other professions, but the fact that advocates are a very small group performing a specialised function by exercise of individual skill gives their role special prestige. In fact the myth may be more important than reality in creating a public image, and also in maintaining a self image, which influences professional ethics and standards generally. These are controlled strictly by the group itself, which cannot be compared closely with any other professional group in Britain today. None other is so small in number and yet so influential; none other exercises monopoly powers; none other is so exclusive in its admission policy; none other is so free of State control in matters of training, discipline and right of expulsion; none depends so much on an unwritten code of professional behaviour and on tacit sanctions to enforce its norms. The high social density, solidarity and control implicit in the structure of the group is unique among accounts of professional associations.

Chapter 7THE PROFESSIONAL LIFE CYCLE OF THE ADVOCATE

The 'briefless barrister' has been a tragic-comic figure in fiction, and the transformation of his life from frustration and anxiety, to prosperity and success by one intervention of Fortune has a romantic quality. From Dickens and Thackeray to Henry Cecil the story has been told of England. Beyond the realm of fiction such stories are sometimes authenticated, and the virtually briefless Erskine pleaded memorably in Captain Baillie's case, imagining as he spoke that his children were plucking at his gown saying 'Now, father, is the time to get us bread'. He left the court besieged by importunate solicitors. In fact, however, patterns of counsel are rarely determined in Scotland or England by one wave of Fortune's wand pointing to opportunity. This is not, however, to say that luck plays no part in the professional success of an advocate; indeed as with the General so with the Advocate. Nevertheless the factor of luck is too often exaggerated, and other more constant factors operate disregarded by those outside the profession who conjecture as to the reasons for gradations in esteem among advocates.

Before admission¹ an intransigent 'devils' to an experienced junior, attends his consultations, drafts opinions, pleadings and other papers for him, and is admitted gratuitously to the confidence of his 'master', in all professional matters. Throughout his career he will defer to the man who initiated him. He will necessarily have many dealings with his 'master's' clerk and meet the solicitors who have instructed the 'master'. Already the 'devil's'

1. See p. 92 supra

professional capacity will be under scrutiny by some of those who will influence his future at the Bar, certain solicitors and the clerk. Usually on 'passing advocate' the newly admitted member of the Bar will be taken on by the clerk (one of four in the Faculty) who acts for the 'master'. At this stage the advocate's status vis-a-vis the clerk and the solicitors whom he has encountered as a 'devil' undergoes a certain change. They are well aware of the limitations inherent in inexperience, and their esteem is suspended, but his role is set. In small matters, probably those with which he has come into contact with as a 'devil', he may be instructed if his former master is not available. His pattern of life (in which professional and private aspects overlap) and his dress set him apart. The youngest and least experienced advocate seems noticeably to gain in confidence and authority when he plays his role in wig and gown. These also add a certain mystique in the eyes of the average, if not of the most sophisticated, lay client. In some countries such as the Soviet Union and Sweden, and generally speaking in the U.S.A., special professional dress for lawyers is disapproved because it is thought 'undemocratic' and creates distance between laymen and profession. The Faculty of Advocates prefers to maintain that distance which assists the advocate to perform his role as the professional group itself thinks most appropriate. On admission, as has been said, an advocate's status is established. There is equality and interchangeability of roles. Yet seniority within the Faculty is also determined by date of admission and is never altered. Thus on an omnibus in which a number of advocates are travelling from the New Town to Parliament House, the senior will pay the fares of the junior on every occasion. This may possibly encourage some of the more senior to walk up the Mound. Seniority on the role of Queen's Counsel is also fixed in the

patent declaring an individual's appointment.

In his first few years the young advocate will be largely concerned to gain the esteem of the legal profession in all its branches, from judges to clerks, but most important, for financial reasons, of solicitors. For less tangible but no less important reasons he will seek to gain the esteem of his brethren at the Bar. There are many situations in civil and criminal proceedings in which counsel may best further his client's interests by informal discussions with his professional opponent. Interaction between two counsel discussing (say) settlement or compromise or the citing of a witness or the possibility of the Crown accepting a plea of guilty to a lesser charge than that stated in the indictment, is influenced by considerations of mutual confidence and esteem.

As has been observed already, however, the esteem of solicitors is for an advocate the most important for success. To gain that esteem he must have adequate opportunity to show his skill in practice, and this has been notoriously difficult for certain groups at the Bar. An advocate who has the backing of influential interests, such as a relative in a solicitor's firm which does a great deal of Court work or an uncle in an insurance company or a father on the council of a local authority, may expect to have opportunity to prove his skill reasonably soon. The importance of such 'influence' on the advocates' careers is discussed later.² He will be tried out on small matters, often in association with an experienced colleague. If he is able, preserves his health and does not offend against the ethical standards of the

2. See p. 176.

profession he should be well set to ascend the ladder of promotion. Influence of this kind will not be used indiscriminately by responsible professional or commercial men who owe a duty to their own clients and customers, nor will influence compensate for lack of professional skill. It can, however, give a young advocate an early opportunity to gain esteem, and, if he gains it, to increase it.

Without influence at all a number of advocates manage to establish themselves fairly rapidly, while others may have to wait a considerable time before building up a substantial practice. Some of those who have risen to the highest positions on the Bench and at the Bar were not earning even a modest livelihood at the end of five years from admission. The extension of legal aid to criminal as well as civil work may, however, cut down this category considerably. According to the 1964 Report of the Trustees of the Carnegie Trust for the Universities of Scotland all of the young advocates who had received grants for research projects in the History of Scots Law had abandoned them because of the increasing demands which growing practice made on their time. Those who can afford to wait are often advocates from the more privileged economic groups. The dues for admission in themselves operate to exclude from the profession of advocate lawyers of talent. Possession of adequate financial resources to survive the 'lean years' after call increases the chances of an advocate eventually reaching the top of his profession. Throughout the life cycle of an advocate capacity to 'hang on' financially, physically and emotionally is important for advancement both in prestige and in esteem. Apart from private means, a young advocate is permitted to supplement his income while in practice by law teaching and

writing, though in Scotland the rewards in either case are very moderate. Another form of speculative investment is politics, which has been a considerable factor in securing preferment at the Scottish Bar. Paradoxically few advocates really wish to be elected to Parliament unless they have hopes of becoming a Law Officer, because it is impracticable to combine attendance at the Parliament House with attendance at Westminster. Nevertheless, association with a political party may lead at least to appointment as one of the Advocates Depute, who change with the Government in power. These offices change with the Government and are greatly coveted. The song 'The Vicar of Bray' was altered by a wit at the Bar into: 'And whatsoever Party's in, I'll still be an advocate-depute'.

Some of the advocates most likely to reach the top are already recognised as such within two to three years of admission. If at the end of five years an advocate has not established himself in reasonable practice, which presupposes the esteem of a sufficient body of solicitors, his prospects of achieving eventual success at the Bar are slight. In Scotland, though there may now be more talk of, and conjecture at, the amount of counsel's earnings than formerly, this may well be due to the introduction of legal aid for which the tariff had to be argued domestically and with the state. Certainly a clerk remarked to one of his counsel: 'The Faculty is more commercialised than it used to be'. If this is true it would suggest a major change or a breakdown in the social system, an alteration in role and in structure. No evidence has been found to support this belief. Moreover, there may be a certain tendency for some counsel to prolong a case on legal aid longer than they would, were their clients unassisted. Field-work has, however, revealed that such practices

were more attributable to deviant behaviour than to a general lowering of the professional ethic. Statements about Health Service doctors 'passing off patients quickly' have proved to be equally unsubstantiated. There have always been individuals with poor professional standards, including doctors and lawyers. Nevertheless, prestige is assessed within the legal community not according to earnings directly but in terms of how 'busy' a particular advocate may be. Thus, for example, advocates' wives loyally complain to each other of how busy their husbands are; and not a few young advocates exhaust themselves each day in the Parliament House in their efforts to appear employed. There are subterfuges such as keeping old papers in the box in the corridor outside the Divisions, being seen on the floor, but not too long or too often, and retreating to the Law Room or Reading Room where solicitors may not penetrate. An advocate's practice need not be large in the sense of having numerous clients. An advocate who has a 'high class' practice may do much of his work in chambers, only being instructed on relatively few occasions to appear in court; but these are lucrative appearances and he enjoys the esteem of the Faculty. Another who is frequently instructed in undefended divorce or criminal work may in fact be held in less esteem by the Faculty itself and by the more influential solicitors. This is an important consideration in the next phase of an advocate's life. It is the esteem which an advocate commands within the legal profession itself rather than the public stereotype which is important for advancement. Indeed the profession attempts to prevent the public from awarding status. This may be contrasted with the profession of acting in which the public rather than the group itself determines an individual's place.³ T.H. Marshall suggests that the successful barrister and medical specialist may most often fall below the

3. T.H. Marshall Sociology at the Crossroads p. 158

professional ideal and deviate from strict professional standards. There seems possibly to be some element of truth in this suggestion, if by 'successful counsel' one supposes the flamboyant type of fashionable counsel. This type in fact corresponds quite closely to the actor (cf. the Roman orator), and may to some extent succeed by reason of a popular stereotype. He may cultivate eccentricities of dress or manner which appeal to the public but not to the professional group. His practice will be largely criminal or involve appearance before a jury. This is not, however, the type of practice which gains the esteem of colleagues or of high class solicitors - who may indeed regard such employment as undesirable and reason for disesteem. There have been great advocates who have been great lawyers like the late Lord Birkett or Lord Aitchison. On the other hand the famous counsel Marshall Hall Q.C. was sometimes slightly referred to by other barristers as 'Necessity' on the grounds that he knew no law. Except perhaps in the criminal courts, the era of the actor-advocate seems to be a thing of the past, and American observers of Court of Session proceedings have been impressed by the almost detached presentation of a client's case by an advocate of to-day. A careful argument and unemotional approach seem to be the most acceptable forensic techniques for purposes of gaining professional esteem.

In England it is not at all uncommon for a barrister to spend his whole professional life as a junior or 'utter' barrister, and such a man may make a very substantial income. If he considers that the kind of work undertaken by a Q.C., in a particular leading ⁱⁿ Court, is not that at which he is likely to be outstandingly successful, he may elect to retain esteem as a 'busy-junior'. Certain kinds of work, such as the drafting of pleadings, are

reserved for the junior⁴ Bar. In Scotland there was for centuries a tradition of complete interchangeability of role within the Faculty. There might be differences in the esteem accorded to individuals according to their abilities, but no formal distinctions of status were made. Attempts to introduce such distinctions were discouraged. Thus Cockburn in 1831 wrote⁵ 'The honour would be certain to be abused in its distinction, and where it is rightly conferred, of what use is it in addition to the natural prestige of merit? I have never known a vestige of professional jealousy at our Bar.' However, as has been explained already⁶ for reasons external to the Scottish Bar as such, the creation of a roll of Queen's Counsel for Scotland was authorised in 1897.⁷ This innovation has created a difference of status and function of relevance to an advocate's 'life cycle'.

The etiquette relating to 'application for silk' has already been discussed. An advocate who has rapidly built up a heavy junior practice may apply for silk in his mid thirties to relieve himself of more work than he can carry. Each application to the Lord Justice General must be prefaced by intimation by the applicant to advocates senior to himself of his intention to apply, so as to give his seniors the opportunity to take the step first. Accordingly, each time an advocate declines this invitation he is usually tacitly accepting that he cannot compete on equal terms with one of less seniority. Those who apply young and succeed as Queen's Counsel gain not only in status but also in esteem; those who defer decisions may be in danger of losing esteem within their status. (This is not an invariable result. Thus the Standing

4. Megarry Lawyer and Litigant in England p.90

5. Journal i p. 3 also p.75 supra

6. p.98 supra

7. p.233 infra

Junior Counsel for Revenue matters may regard his esteem secure and his fees beyond what most Q.C.s earn, even though he allows his juniors to precede him on what Mr. Megarry has termed the 'Silken ladder'). In Scotland today an advocate is virtually forced to take silk eventually or to seek an appointment outside court practices. In England a barrister contemplating silk may elect to 'take the plunge'⁸: in Scotland an advocate may be 'pushed in'. At a certain stage of seniority - perhaps about fourteen years after admission to Faculty, an advocate may be expected to take silk as a matter of course. Thus it would be fair to say that the minimum standard of professional skill which is required before silk is granted in England is substantially higher than in Scotland - though of course leading Scottish Q.C.s may surpass the best in England. One consequence is that in Scotland, though a formal difference in status and prestige result from taking silk, the tradition of interchangeability of function in the profession is to some extent retained. The profession itself will accord greater esteem to a busy and successful 'junior' advocate than to one who has been virtually compelled by his seniority to take silk.

Instead of facing the prospect of starting professional life at a new, hazardous and more competitive level as Q.C., an advocate may apply for an appointment, outside Court practice, for which his status and seniority have qualified him. Thus after five years practice he is qualified for an appointment as sheriff-substitute. Within the past decade the salaries of sheriffs-substitute have been increased substantially, and are reviewed with those of higher civil servants. Accordingly appointments, which formerly were often

8. Megarry, op cit. p. 87 et seq

accepted as a 'second best' solution even financially and as a symbol of falling behind in the contest for forensic esteem, are now sought competitively by quite successful advocates. Though the less important appointments as sheriff-substitute may be made from the junior bar, the important posts today are often filled by men who have done well, taken silk, but have not been among the most successful in practice. The work of a sheriff-substitute in the larger towns and cities is responsible, respected and satisfying, yet few probably accept office without a certain regret - and the same may be said of some academic lawyers and advocates in the Civil Services. Sheriffs-substitute are well remunerated and respected as such, but the decision to accept office removes most from the focal centre of their professional life hitherto, Parliament House and the New Town, while the sheriffs-substitute in Edinburgh itself cannot compete in prestige with the Senators of the College of Justice across the High Street. In the country sheriffdoms where work is not pressing an advocate may sometimes find life boring by contrast with life in the Parliament House, and take to 'county life' or even to drink. On the other hand, others become invaluable members of the local community or contributors to legal writing. It has been the practice to appoint advocates to most vacancies for the office of sheriff-substitute, a discrimination which is resented by solicitors who are much more numerous and may be at least as able. The likelihood of being appointed as sheriff-substitute is generally regarded as an insurance against the hazards of an advocate's life such as ill health, and the strain of busy practice is severe. Notoriously, while many advocates appointed are first class lawyers, some, especially in the past, would never have been considered for appointment on a competitive evaluation of merit. Moreover, when solicitors are appointed sheriffs-substitute it is usually at

a substantially older age than in the case of advocates. In a Memorandum of Evidence submitted by the Faculty of Law of Edinburgh University to the Grant Committee on the Sheriff Courts in 1964 it was estimated that of 60 sheriffs substitute, 49 had been appointed from the Faculty of Advocates. The average age at appointment of a sample group of 26 recent appointments was 39.8 years, though for B and C class sheriffdoms the average age on appointment was considerably lower. It appeared that of 104 advocates admitted in the period 1945 - 1963 inclusive, 23 never entered practice in Scotland, and of the remaining 81, 33 are now on the Shrieval Bench. An advocate's expectation of appointment is therefore substantial. The few solicitors appointed were substantially older than advocates on appointment. On average they were 52 years old on appointment.

Any study of individualisation within a group is rewarding. In the case of the Faculty of Advocates individualisation is achieved within a particularly small and compact group. An advocate's life, within the solidarity of the group, is intensely competitive, though the role must be played according to strict professional norms, and to opt out of the competition before the top prize of a judgeship is achieved, is in a sense to accept, to be regarded as having ceded, the possibilities of highest prestige and esteem. Sheriffs-substitute are in fact the 'district judges' of Scotland and therefore to some extent resent the jurisdiction and status of the Sheriffs Principal⁹ who (apart from the exceptional cases of Glasgow and Edinburgh) are normally Q.C.s still in practice in the Parliament House. While the Sheriffs-substitute are the

9. see p.114 supra; p.261 et seq. infra

more experienced judges, the Sheriffs-Principal (unless they have retired from active practice or are in dwindling practice compared with the leaders at the Bar) command esteem in Edinburgh principally as successful advocates, but also have specially high status in their respective Sheriffdoms. No Sheriff-substitute has been directly appointed to the Bench of the Court of Session, though in rare cases a Sheriff substitute has been promoted to the appointment of full-time Sheriff Principal.

If an advocate decides not to remain in practice until he takes silk, there are a number of options open to him apart from the Shrieval bench, such as University teaching (which is expanding and progressing rapidly at present) or joining the staff of the Lord Advocate's Department or joining the Procurator Fiscal Service. With the exception of the office of senior Legal Secretary in the Lord Advocate's Department and University chairs, these various occupations do not compete financially nor in prestige with appointments as Sheriffs substitute.

On the assumption that an advocate remains in practice until he takes silk, he will thereafter enter substantially the same game, but for higher stakes. His prestige so far as the public at least are concerned will be higher than that of an advocate who has not received a patent. He will not, and may not, be employed to undertake some classes of work, such as drafting pleadings or conducting the ordinary undefended divorce case, and will normally only appear when a case is important enough to require both a senior and a junior. Accordingly every Q.C. on taking silk must compete with those whose esteem as leaders of the bar is well established in the hope that, when judicial promotion has thinned their ranks, he too may be regarded by the profession as an acknowledged leader. Clearly there is not room at the top for everyone, and some will drop out of the competition, accepting appointment

as Sheriffs substitute or as legal Chairmen of various Tribunals. In general the more senior Q.C.s may expect to be appointed to the office of Sheriff Principal (of whom there are twelve). The Sheriffs Principal of the Lothians and Peebles (Edinburgh) and of Lanarkshire (Glasgow) are full time appointments and the Q.C.s appointed to these offices (unless in the rare case of the elevation of Sheriff Substitute) in effect renounce as beyond their reach the highest prestige as Senator of the College of Justice. The other Sheriffs Principal - viewed in the context of the advocate's life cycle - fall roughly into two classes. For those who are leading the field in practice, experience as Sheriff Principal provides preliminary judicial experience before elevation to the Bench of the Court of Session. For others who have not held their place in the closing laps of the race, the office of Sheriff Principal is to some extent a consolation prize which provides a useful supplement to income without excessive official duties, and which confers high prestige within the Sheriff's own Sheriffdom. In the latter category will be found some of those most jealous of the status, which is the highest which they can expect. Their prestige in their sheriffdoms is substantially higher than that accorded by the professional group in Edinburgh. The same may be said of some Q.C.s who leave practice for University Chairs. Having opted out of competition within the group, highest esteem is withheld.

The most prestigious role possible for an advocate is that of a judge (Senator of the College of Justice). This is the reward for lasting the course despite all strains and hazards, recognition of individual success won by physical and moral toughness. Such an advocate takes his place on the Bench with the judicial title of Lord X¹⁰ and, though his judicial duties as Lord

10. P.G.B. McNeill 1954 S.L.T. (News) 125

Ordinary may often be less interesting or exacting than those of a Sheriff substitute, by tradition his prestige in Scotland is high. (Social anthropological analysis of the roles of Scottish judges would provide material for another thesis and is not attempted here). Within the Faculty itself the highest esteem is accorded to the Dean of Faculty. Very few of the most successful advocates of Scotland have not been promoted to the Bench. In some cases there may be a breakdown in health after long and successful practice before a vacancy occurs; in others factors affecting an individual's private life may make him unacceptable according to professional norms for judicial office; others have been baulked in the past by political considerations. It is generally accepted that the Dean of Faculty, the group's elected head, will be offered a seat on the Bench after holding office for two or more years. (Earlier abandonment of the Faculty's most honourable office is discouraged). The other Faculty offices which carry expectations of judicial promotion have already been noted. Yet in the present century at least three Deans of Faculty, Asher, Condie Sandeman and R.P. Morrison were passed over. The latter two, of course, had held but had resigned the Deanship of Faculty, but Asher's case deserves special mention. Born in 1835, he was admitted to Faculty in 1861. He held office as Solicitor General on three occasions, but resigned in 1894. In 1895 he was elected Dean of Faculty, and held that Office until his death in 1905. His brethren commissioned his portrait, and in 1902 caused it to be placed in the Parliament Hall, the only case of the portrait of a practising advocate being hung there in his lifetime. The political embargo which the Conservative Party imposed on Asher's elevation to the judiciary is strangely compensated by the solidarity of the Faculty of Advocates, irrespective of political opinion, in honouring their elected leader.

The names and reputations of many of those who attained the Bench in Asher's time are virtually forgotten, but Dean of Faculty Asher has established a special place in Faculty legend. Young advocates observing his portrait not infrequently ask their older brethren for an account of this man.

The influence of politics in the Faculty of Advocates has already been described. In the present context of the advocate's life cycle it may be sufficient to add that prudent association with a political party increases and accelerates prospects of promotion to the Bench, but does not necessarily command the esteem of the group. This depends on recognition of an individual's professional skills combined with observance of the accepted norms of conduct. The leaders of the Bar are essentially recognised by the group itself, quite independently of any public stereotype. The clearest recognition of this group esteem is usually election of an advocate as Dean, though in an election contested by more than two candidates there may be room for doubt whether the man elected is necessarily held in highest esteem by those in actual practice.

It may be observed that most Deans of Faculty, while esteemed for professional skill have also usually belonged to an in-group within the Faculty itself based on class-education factors. On the other hand ability and personality have latterly opened the office to others not of the in-group. The rank equality of all advocates tends to social equality, reducing social distance, as of course does the element of propinquity in the various roles played by advocates. The fact that a situation of such high social density and therefore of great social control reduce. The significance of social class is analysed in a later chapter¹¹. Such considerations weaken the influence of the in-group, though it survives in attenuated form. There are still a few

11. infra p. 212.

advocates who attend the Parliament House without substantial practice and without ambition to gain it. In due course they take silk, and become very influential in Faculty matters, often as Officers of the Faculty. These are men of independent means usually of the in group. The fact that they are primarily concerned with the interests of the Faculty as such rather than with their own personal advancement or remuneration gains them the substantial esteem of many advocates, though some, not of the in group may resent and envy them. These independent figures, who will not leave the Floor for the Bench are important as guardians of professional norms and of the solidarity of the group. Their orientation is essentially conservative and they will jealously defend the privileges of the Faculty. This element which was more prominent in past centuries may be dying out, and it is difficult to believe that the professional ethos would be noticeably affected by the disappearance of those advocates for whom the status rather than the work-role is important.

The advocate's life cycle may then be summarised as follows. Esteem of the group is all important and highest esteem can only be gained by succeeding competitively at every stage in the role of the practising advocate. A seat on the Bench, however, is accepted as the appropriate recognition of a highly successful advocate; rather less esteem is accorded to promotions influenced by association with a political party. The highest esteem is given to the Dean of the Faculty of Advocates and after him to a small number of leading Q.C.s some of whom may be Sheriffs Principal, a factor which does not greatly influence their position in Edinburgh. Next in esteem probably come busy Q.C.s and a few very busy and fairly senior advocates who have not yet taken silk, and after them ranking is debatable. In Scotland the tradition

of interchangeability of function (though no longer complete) seems to blur the discrimination in prestige accorded officially and by the public between Q.C.s and other advocates. Esteem within the group is more important, and the rest of the Bar outside the groups mentioned are evaluated as individuals by the legal profession. Those who have opted out of the competition for success in practice may command esteem within the professional group according to different standards. The Bar recognizes that some advocates must learn other legal skills, e.g. judicial, administrative or academic, and accepts them as still part of the group, though with some discrimination. Ranking above the 'busy Q.C., very busy junior' class one might place the Sheriffs of the Lothians and Peebles and of Lanark, and on par with or slightly inferior to the 'busy Q.C., very busy junior' class one might rate now practising Sheriffs Principal, the most efficient Sheriffs substitute in busy sheriffdoms, the Legal Secretary to the Lord Advocate and occasionally an academic lawyer. Those Sheriffs substitute who have not to undertake much responsible judicial work, the junior staff of the Lord Advocate's Department and a number of academic lawyers receive approximately the same esteem as if they had remained at the Bar in reasonable but not exceptionally distinguished junior practice.

This ranking is known by the role-set, and in the wider community to close associates only. The greater the social distance of the observer the less accurate it will be and for the public at large all that will be known will be the categories 'advocate', 'Q.C.', 'Sheriff', 'Judge', the last three having a greater status value than the first. The writer has found that many people do not know the meaning of the status 'advocate' and even in Scotland understand the status better when it is described as 'barrister'. This may be due to the fact that few books, films or television versions of the Scottish

system appear while a very large number do about the English Bar. The status 'barrister' is generally awarded high prestige even by people at a considerable social distance from any holder of it.

Willmott and Young¹² give a clear example of this in 'Family and Class in a London Suburb'. 'We have a very dear friend at Woodford Green who's a practising barrister. It never struck us that people might like to know them just because he was a barrister, but when the wife's needlework group had a meeting there, some of the wives were very pleased just because he was a barrister'. The substitution of the word advocate would not produce the same response even in Scotland.

In his life cycle it is clearly true that the advocate's status becomes noticeably higher in the minds of the public when he is designated 'Q.C.' The public image of this rank differs markedly from that within the profession itself.

12. Willmott and Young Family and Class in a London Suburb p. 111

Chapter 8THE ADVOCATE'S ROLE-SET

Robert K. Merton remarks that¹ 'contemporary sociological theorists are largely at one in adopting the premise that social statuses and social roles comprise major building blocks of social structure.' This study is largely about the status and role of the advocate seen historically and comparatively in Part One and now sociologically in Part Two. Linton² meant by status a position in a social system involving designated rights and obligations; by role, the behaviour orientated to these patterned expectations of others. That everyone occupies many statuses and fulfils the roles associated with them is evident. Merton goes on to say:³ 'Unlike Linton, I begin with the premise that each social status involves not a single associated role, but an array of roles. This basic feature of social structure can be registered by the distinctive but not formidable term role-set.' Now this concept of Merton's could lead to an infinity of relationships being associated with any given role; it rather resembles a man throwing a handful of pebbles into a pool and being surprised by the number of eddies and intersections of circles. However, for the purpose of this thesis, it is proposed to use Merton's word role-set in the simple sense in which he defines it: '... Then, by role-set I mean that complement of role relationships in which persons are involved by virtue of occupying a particular social status.' As Merton himself points out this concept helps to show the social mechanisms which operate in preventing or producing role-conflict.

-
1. Robert K. Merton, *The Role-Set: Problems in Sociological Theory*: British Journal of Sociology, (1957) p.110.
 2. Ralph Linton, 'The Study of Man', chap. VIII.
 3. Robert K. Merton, op.cit.

The Advocate and the Clerk

The most important members of the advocate's role-set are the judges, his clients, the solicitor and his clerk. This chapter will deal mainly with the last two. It will suggest that in his relationship with these two categories of persons there can be some possible situations and activities in which role-conflict could arise. The advocate's role has been seen to be related to the structure of the system in which he operates, and has been seen in its three-fold nature: namely, as officer of the court, as a member of his profession and in relation to his client. It is meant by the use of the word 'role' to suggest the performance of a set of ~~rights~~ and obligations. The behaviour expected of the player is the content of the role, and the behaviour is differentiated because the player has many roles. The advocate has three in the professional field; he has others in his life which are not relevant here. Nevertheless it must again be noted that his 'part' (to use again the acting motif) is played in public a great deal of the time. In Southall's major categories of roles - kinship and ethnic, economic, political, ritual or religious, and recreational - it has been seen that the advocate's role-playing of any of these aspects of his 'part' is not unrelated to the others. The solicitor and his client are frequently in a position to observe, or could if they would observe, him either directly or through gossip in any of his roles. The nature of the group, it must be stressed yet again, is one in which privacy is unlikely to be achieved, and therefore one in which considerable social control is exercised over all his roles. Since it is the inter-relations between roles and their differentiation that is of particular interest the role relationship between the advocate on the one hand and the solicitor and clerk on the other must be examined.

In the chain of communication between the advocate and the client, the clerk very frequently comes first. Therefore, the description of the clerk's work or of his role in relation to the advocate will be taken before that of the solicitor.

In the Parliament House there are four advocates' clerks to serve the entire profession. In Green's Legal Diary 1965 the number of practising advocates stands at 124 and the clerks serve 34, 24, 30 and 36 advocates respectively. This list is inaccurate. The number of advocates actually practising and requiring the services of a clerk is as nearly as can be ascertained 108-110. (It is difficult to be accurate; for example, less than a week before the writer completed her final draft (April 1965) four advocates had been called to the Bar and at least two had left to take up other employment in the legal world). One clerk consulted at this time on comparing his own private list of advocates he serves with the list in Green's Legal Diary found a substantial discrepancy between the two. He had on his list 28 advocates (two of whom had been newly 'called' and therefore could not have been on Green's list at all). Therefore he served 28 and not 34 as listed by Green. Clerks' duties are fairly onerous. They attend at the Parliament House in the morning before the arrival of the advocates. The Courts sit at 10. a.m. so most members of the Bar reach Parliament House between 9.45 a.m. and 10 a.m. The bagman will have earlier delivered the bags of the busier advocates who employ him, and will have unpacked all papers into the advocates' boxes which are in a corridor of the Parliament Hall outside the 'Divisions'. The clerk writes up the advocate's professional diary, entering in it all consultations and cases for which the advocate has been instructed. This personal professional diary goes up and down with the

advocate's other papers in the bag. The clerk can therefore consult it in the box during the working day, as he is approached by solicitors wishing to instruct one of 'his' advocates. His working day at the Parliament House will be spent largely in consulting with solicitors and with his advocates about administrative arrangements for present or future cases and in seeing that his advocates' cases do not overlap. The clerk negotiates the advocate's fees with the solicitor mainly according to a recognised scale at the lower level of practice, but more according to the 'market value' of the particular advocate in the most successful class.

The clerk's personal relations with the solicitor are of great importance both to himself and to his advocate. He is remunerated by fees based on a proportion of the advocate's honorarium. This has not changed since it was fixed by the Court in the Act of Sederunt, 15th July 1876. The clerks' scale of fees is as follows: he receives 2/6 on one guinea, 5/- on two to five guineas, 7/6 on from 5 to 10 guineas and thereafter 5% of the amount of the advocate's fee. Because the advocate's fees have been increased since 1876 and because the clerk's fees are a proportion of the advocate's this might seem an equitable arrangement. The belief is held, however, that advocates' fees lag behind the general rise in the cost of living, and the clerks believe that, having even less of a 'Trade Union' than the advocates, their remuneration has not kept up with the general rise in wages, salaries or fees. It nevertheless sometimes seems to the young advocate that his clerk is better off than he is. The status-income dilemma does arise at the beginning of the advocate's career. It seems unilluminating to do anything but describe this fact. The advocate's clerk does seem to the young advocate to be more prosperous than himself; the clerk is 'better off' in conspicuous consumption terms. He has a newer motor-

car when the advocate has possibly a serviceable and rather old model, and a more 'desirable residence' costing more, when the advocate either from necessity or from choice usually prefers 'the Quarter'.

It is interesting to note at this point a matter which has not been sufficiently relevant to discuss elsewhere - the 'snob' aspect of 'the Quarter'. The New Town of Edinburgh which constitutes 'the Quarter' is impeccably Georgian, some of it including the most admirable of upper and upper-middle class Georgian houses, so fashionable in our time and so properly admired for their proportion and elegance. These houses are by modern standards large and costly to keep. It is suggested by those who live outside 'the Quarter' that for the last reasons they are inferior. The upper and upper middle class elements in the Faculty have continued to live in them. They have preferred the aesthetic qualities and the undoubted nearness of these houses to anything that 'matters', to the relative disagreeableness of living in suburbia, which entails among other inconveniences long tedious drives to their place of work or to the schools of their children. These New Town houses between the two World Wars and for several years after the Second, depreciated in value. It is suggested that this was due to two main causes: - first, the increasing use of the motor-car and, secondly, the generally held idea that a well placed and well appointed kitchen is the most important part of a house. That these New Town houses are now increasing in value at an astonishing rate is due again to two main causes. The increase in the number of motor-car owners and users has made the journey from suburbia more difficult and time consuming, and the possibility of creating a utilitarian kitchen in a house with aesthetic qualities has become economically possible. All the advocates' clerks live in suburbia. It is also true that 30-40% of advocates now do so too; the class motif is not being unduly

stressed. What is being stated is that in recent years, and until fairly recently, the superiority of living in certain parts of suburbia was assumed by many of the middle classes and this view was founded on considerations of affluence and wealth.

This fact of the clerks' superior economic status in relation to the young advocate has been widely observed in fieldwork among the advocates. It has been suggested that the chief aim of the clerk is to make money. How else can he gain high prestige? His status is that of clerk to an advocate; his training is not controlled by any professional norms; his recruitment and qualifications are not the subject of any known regulation; he achieves his success and standing, unlike the advocate or the solicitor, by the more generally accepted 'class' standards of modern Britain - by being economically successful.

To be economically successful the clerk must ensure that his advocates are so. Chance plays some part in this. But at the outset of the young advocate's career his clerk is of the utmost importance. The clerk's personal relations with the solicitor are therefore of great value. He is often, and especially at the beginning of the advocate's professional life, the chief intermediary between the advocate and his patrons, the solicitors. If a solicitor approaches the clerk to ask if Mr X can take a case, and Mr X is already engaged, the clerk will endeavour to produce a Mr Y from his own 'family' of advocates. (The clerks have this terminology; they keep cases if possible 'within the family.') In this way a clerk may contribute to the practice of any of his junior counsel. His influence is smaller after the advocate's own professional value and reputation have become established. At the top of the Junior Bar and of the Senior Bar certain individuals become known to their peers,

to solicitors and to clerks as outstanding practitioners, and any solicitor will be concerned to instruct them in causes in which they may excel. Here the clerk has little influence. But, as we have seen, the bulk of the work at the Scottish Bar is not of this nature. The interchangeability of counsel is not a fiction but a relative truth. The clerk is in a position to intervene when Mr X is unavailable and may, without in any way contravening the system, put work in the way of Mr Y instead of allowing it to go to Mr A in the 'family' of another clerk.

In the first ten years at least of his career this is of great importance to the young advocate. Each year one or more 'senior juniors' take silk. All the junior work they have had falls to be reallocated. Their clerks here have a great importance. Any competent advocate can perform in this sphere of junior work. The clerk will suggest to the solicitor one or any of 'his' advocates for work that the new silk would formerly have done. At the top end of the profession, however, the advocate's own standing is the relevant factor. The advocates, the solicitors and the clerks know that the distinguished or capable Mr P cannot be replaced by any Mr X. Mr P's successor will be chosen from the 'family' of any clerk. At this stage in the advocate's life the clerk's influence will or may be irrelevant, although his assistance will still be necessary. In the evaluation of the services of the clerk (outside his purely clerical functions - of providing shorthand and typing facilities for which he is paid, of keeping the diary, etc.) he may be said to be most important as an intermediary in the early years of the advocate's career - mediating work to those who are less successful and may be free when the more admired of their brethren cannot accept all the briefs offered to them.

This exposition has, to a great extent, represented the advocate's view of the matter. The clerk's own view is different, as can be imagined. He can be seen, and might see himself, as supplying a free service to the advocate. The young advocate has the services of a fully qualified clerk which costs him nothing. On the other hand the clerk has considerable expenses. He buys all paper, pays all postage both of letters and heavy packages of papers, pays telephone calls, typist, tape-recorder service, etc. It was recounted to the writer that tape-recording equipment and services cost one clerk £600 last year. Typists have to be highly qualified and intelligent because of the nature of the work involved, and so have relatively high wages. The clerk's car could be seen as part of his expenses because it is necessary for his job. His duties of collecting and delivering papers at the advocates' houses or chambers in vacations or at other times when the Parliament House is not in session would be impossible without a motor-car. On the other hand some of these expenses are chargeable against the client and can undoubtedly be claimed against income tax. To quote A.J.G. Mackay,⁴ 'Advocates have clerks whose duty it is to write or copy the papers prepared by their masters and to attend them in court. They are paid not by salary, but by fees exigible from the client and in practice usually paid by the agent at the close of each session.'

The clerks' duties comprise more than those specified by Mackay and for many of their services it would be difficult to fix a readily estimable recompense. These clerks have the qualities of trained, professional, solid citizens. They appear not only to know, but also to insist on, the same ethical standards as their advocates, and feel they have some influence in instilling

4. Court of Session Practice i p.120.

these in the new young advocate. They take pride in the fact that no clerk, any more than an advocate, would break the known customs and mores of the system. One clerk informed the writer of a small breach of the advocate's code to the following effect. A young advocate X in the course of a train journey had decried the skill of brother advocate Y to a solicitor who had been intent on employing Y. Subsequently, the solicitor, reporting this to the clerk, 'swore' that he would not in future put any work in the way of X who had in his view behaved with disloyalty and impropriety. The clerk, telling this tale to the writer, **remarked**: 'I often tell this to my young lads (scil., advocates) as an example both of what is done and of how such behaviour gets around. Not,' he added, 'that there are many that need to be told. But I think the clerk can be a great help to the young ones.' It seems clear that the clerk does play an important part in the social as opposed to the technical training and role acquisition of the young advocate.

The clerk can also be a great help in recommending counsel to the solicitor and in ~~this~~ it must be noted that the clerk is hazarding his own reputation as well as that of his advocates. The clerk's role demands judgment of character as well as competence in his duties. He is often one of the shrewdest observers and judges of the ability, chances of success and esteem of the advocate, and will naturally use this knowledge if his opinion is asked. One clerk insisted that 'if a chap (scil., advocate) is keen he'll get the work. One of my own lads, just started up, was there when some one had to be found quickly for a small case. This Mr A did the job, and three times in succession did a similar job for the same agents. The agent said he felt he was "using" Mr A whom he thought to be a competent and decent wee chap and he'd sent him all his work since.'

It became clear as information from all sources was collected that the clerks identify closely with the advocates. They see, and are seen to have, an image which in some senses is similar to their masters'. This is particularly clear of the role fulfilment and the role expectation of the clerk in relation to the ethical norms and the professional behaviour, attainments and success of counsel. The sanctions against the clerks breaking these norms are similar to those the advocate faces. He might be rebuked by an Officer of the Faculty, or by Counsel; and the primary sanction would, as in the larger group, be gossip which, as has been seen before, exercises a very real control in a community as small as this one. One of the Officers of Faculty said he could suggest no controls of the conduct of the clerks besides the ones suggested above, and thought the ultimate sanction might be by the clerk's Counsel deciding to leave him or to warn their devils against going on the list of the offending clerk. As this senior member of the Bar put the matter of social control in the role-set: 'It is all done by kindness and white spats.' The recruitment and training of the clerks seems to follow no set pattern. One of the present four is a solicitor and took over the 'practice' of a clerk who was retiring and who had served in the Parliament House for fifty years. Two of the clerks started as library boys and learnt from older clerks whose practices they inherited. The fourth took over his father's practice, his father's father having been superintendent of the Parliament House. Traditional skills, customs and ethics of the job are passed from generation to generation orally and by imitation. The most important qualifications for the post seem to be a cheerful and friendly disposition and a methodical and orderly mind.

There have recently been attempts made to find a new clerk to supplement the services of the existing four. The Faculty itself is worried about the dwindling number of clerks and the fact that if any one of the four now practising were to retire there would be no-one even partially trained to replace him. A committee of Faculty was set up to try to find a solution to the problem and decided to advertise for a kind of trainee advocates' clerk. No suitable candidate could be found at the level of remuneration offered and because of the fact of the uncertainty of its future level. The clerk faces the same risks as does the advocate, since his fees are a proportion of his master's rate of remuneration.

The clerks then made efforts to solve the problem, though it would seem that it is one which should be of greater concern to the advocates themselves. The present clerks manage with typists and modern mechanical aids to fulfil their duties, and the introduction of another into their midst would obviously reduce their earnings and involve them in the extra duties of training a new man. However they did make efforts to supplement their number and were unsuccessful. One clerk described the matter in the following way: 'It was difficult to find anyone independent, who would see the work in the right way. And no member of the Bar would want to go to the new clerk because they would feel he had no contacts with solicitors. You can't just allocate a certain number from each of the existing lists to the new man. An advocate has the right to choose his own clerk and the clerk to keep his own advocates. Then some of a chap's list will be earning big money while others are earning almost nothing. Could he be expected to part with his top chaps? In the end we decided to try to get an assistant and to pay him ourselves but we couldn't get anyone at the salary we could afford to pay. So nothing further has been

done.' The fact that the clerks show such concern about this matter is yet another sign of their identifying closely with the group they serve.

Their word usage also shows this identification. 'A took over B's "practice".' One clerk, now deceased, describing his life-cycle in which he started as a library boy, became a judge's clerk and then an advocate's clerk, said 'I went on the Bench with Lord A and when he died I returned to the floor of the Parliament House.'

The clerk's behaviour towards his advocates - and sometimes to all advocates - is frequently such as to show some familiarity rather than any great degree of deference. It is said that the familiarity has been growing and increased rapidly immediately after the war. It can best be illustrated by the naming customs. These had formerly been that advocates called all clerks by their surnames and referred to them similarly. Clerks called counsel 'Sir' and by title and referred to them by title. Many advocates, especially the older ones, still hold strictly to these rules, and the writer has heard much talk of the matter even from the young members of the Bar who would like to have this custom enforced. In fact, however, a large number of counsel call their clerks by the first name and not so large number are so called by the clerks in return. In some cases the exchange of first names is done only in private but it is said to be becoming more usual in the Parliament House itself. Many members of the profession describe actual instances with the greatest disapproval and with such remarks as 'The Dean should do something about it;' other advocates appear to find no harm in the practice. One clerk remarked that the advocates themselves by checking it at all times could halt the matter of which he too disapproves. The fact that the custom is growing might indicate

an aspect of possible role-contamination. An advocate should have the liking and co-operation of his clerk. It might be that, were he to address his clerk as an inferior while others were using an address of equality with the clerk he would be thought of as being arrogant, conceited, 'stuck up' and that he would therefore lose some of the clerk's favour and help. It is always difficult to reverse a process of this kind. That the superordination of the advocate and the subordination of the clerk should be symbolised in their modes of address in their professional relationship is thought by many to be necessary in order to preserve the system. Others, failing to separate the professional and the general social relationships, seem unaware of the possible dangers and conflicts involved.

The conflict involved in the advocates' role as superordinate, as masters in the professional sphere and as equal and friend in the wider social sphere can be clearly seen. The situation in which the clerk could possibly say to the advocate in the work situation 'Well Jack, old chap, I don't seem to have found a case for you today' would clearly show some breakdown in the whole system, not only of deference but of non-contamination and segregation of roles. In fact it is universally agreed that such a remark could not be made except as a joke. There is no avoidance of the subject as there would^{be} were corruption suspected. Both sides have expressed the opinion that such jokes are made frequently and openly and may come from either the advocate or the clerk. In this it can be seen that the superior does not necessarily indicate the role that is to be played. In Michael Banton's analysis of the policeman and his joking relationships with inferiors he gives an example of the situation in which the superior initiates this kind of behaviour. This example from the advocate - clerk relationship gives no indication of a superior - inferior

attitude. There is wide agreement that the clerks rarely use the first names of their advocates except in private. The examples given have almost all related to the behaviour of one clerk towards certain named advocates and could therefore be seen as marks of disapproval of certain individuals rather than a true belief that the entire system is being corrupted.

When the advocate and clerk are seen as part of a team with strictly defined roles and procedures, visible to some of the outside world in their work-role and to the whole of their role-set in the Parliament House, the lack of deference in the clerk's way of addressing the advocate becomes a point of great importance. It might be said to provide in Goffman's words⁵ 'distinctive information.' As he points out ... 'a team must have its secrets and its secrets kept.' There are many advocates who believe that the breakdown in deference customs between clerk and counsel has become much more serious now that it is so openly observed, not only by the advocates themselves, but by solicitors, faculty servants, clients and members of the public who might be in the Parliament House.

A senior officer of the Faculty, himself rigidly observing the former customs of formality, said the custom had so far changed that nothing could be done about it. The writer had been told by more than one advocate that this officer had publicly rebuked a clerk who had been heard addressing a member of the Bar by his first name. This incident was described in terms of great approval and with the suggestion that such matters would soon be put back on the old footing. The Officer of the Faculty denied that the incident had occurred, said he had frequently heard counsel and clerks using first names, and felt that there was little to be done to remedy the matter since it had

5. Erving Goffman, The Presentation of the Self in Everyday Life, p.141.

spread widely. He felt it did not, and could not, lead to any role-contamination. Other counsel suggest by their open dislike of the changed manners that it could. Yet if the matter is so put to them they too deny the possibility that such overt familiarity could have serious consequences for the observance of the proper fulfillment of the role of either advocate or clerk, maintaining only that it is a matter of 'bad form'.

From all sources of information among advocates, solicitors, clerks and Faculty servants and from her own observation the writer has concluded that there is believed to have been some change in manners, in naming and in deference since the 1939 War. She has not had any serious information that would lead her to believe that these small differences have changed or affected for the worse the professional relationship between advocate and clerk. The examples of clerks playing golf with their advocates, dining or drinking with them are many, and such stories as are given may be told from the point of view of favour or disfavour. It seems that they have historical precedent and may not be so much of an innovation as the Faculty imagines. In James Boswell's diary of Thursday, 30th June 1775, he gives a list of his guests at dinner.⁶ 'Captain & Mrs Schaw and their daughter, Dr. Grant, Colonel Webster, Miss Webster, Fairlie, Matthew Dickie and Mr George Haldane dined with us'. Of this list the last named is an advocate and Matthew Dickie is Boswell's clerk. The pattern of familiarity between the two groups has not necessarily changed.

The clerks have frequently achieved and been accorded high status in the general community. Twenty-five years ago an elderly Clerk was Chairman of the Conservative Club in Princes Street and was given some deferential treatment by

6. Boswell for the Defence 1769-1774. Ed. William K. Wimsatt, Jr. and Frederick A. Pottle.

many members of the Bar, of which his son became a member.

The writer was informed by several advocates that at the end of the Second World War an 'All Spheres Club' was initiated to bring together for social purposes advocates, solicitors and clerks. This was at the time the subject of much criticism and comment: no such organisation had hitherto existed. The originators and supporters of the club approved and commended it on general social grounds. The gist of their comment was that all those groups had fought a war together and in comradeship which should not be allowed to lapse. They suggested too that those opposing the venture were motivated by old-fashioned 'snobbish' considerations and should have learnt better. The opposition to the Club based its case on professional rather than general considerations. It pointed out that there could be a fear that some advocates might make use of it for their professional advancement, and asserted generally that it was 'not right'. Though they could not always say why they were against the club, most of them denied all suggestion that they were being snobbish. They were afraid of role conflict though none of them so expressed the matter.

This account of the 'All Spheres Club' is entirely inaccurate and is interpolated to show that even intensive field work within a small group may lead to gross misinformation, and therefore to the construction of theory which is not borne out by the true facts.

There is in existence and in a flourishing condition an 'All Spheres Club' which was founded about 27 years ago by a very small group of young men aged about eighteen to twenty years, all of them engaged as assistants in one capacity or another in the Parliament House. They were described by one of their original number as 'just young lads wanting to join a club together with no

purpose but to meet and enjoy themselves'. One of the number decided to go to the Bar, though this had not been his original intention, some became solicitors, one an advocate's clerk, one a Clerk of Court, and so on. It has never been a large Club, its numbers are limited, and one unwritten rule is that only a small proportion of advocates should be members. Its object is to help and provide a social club for all the young men who have their work in the Parliament House. The original member who went to the Bar became a Queen's Counsel and eventually took his place on the Bench. He then resigned from the Club but he 'keeps up associations with it'. Its members comprise a group of men ranging from solicitors' assistants to senior members of the Bar. 'We have not a member of the House of Lords yet but that may come too'. This comment shows the pride in the group expressed by the informant. He and some others have also expressed the opinion that the Club has helped many young men at the outset of their careers in their relationship with others at work.

It has been said by all informants from this club that no member would or could take advantage of the membership for professional advancement. That those outside the group should imagine this to be possible is met with scorn. The group prides itself on its awareness of the problem and of its solution of it. The solution given is that such unprofessional behaviour could not occur because the rest of the group would observe it, remark on it, disapprove of it and so its recurrence would be unlikely. If any member were to persist in behaviour contrary to the accepted norms of the group the sanction would be ostracism or possibly expulsion.

'We do not like people talking shop'. 'It would certainly be noticed if anyone were "touting" for work'. 'Solicitors and clerks are not fools you know; they'd soon notice people "sucking up" to them just for what they could

get out of it'. Such and similar remarks have been made by informants in this group when they were asked to suggest any point at which the system might allow corruption. They feel that the activities of the group and the roles of the members are kept separate from their other activities and roles. The information gained from outsiders has been largely inaccurate, and has tended to take the form, as happened in the gossip about naming customs, of anecdotes criticising persons rather than criticising the institution itself.

There are in Parliament House, as in all communities, persons who are believed to be norm-breakers. These sometimes persist in such behaviour and the sanctions against them are mainly gossip and ridicule. Further persistence would lead to ostracism and rarely if ever occurs. Men living together have to obey certain rules if their common activities and interactions are to meet with any success. These rules or norms governing the relationship between advocates and clerks are known to all and there is stated to be an almost complete conformity to them. Homans' remark⁷ 'the larger the number of members that conform to a norm, the larger the number that express approval for other members' is certainly borne out by the evidence of the advocate-clerk interactions and activities. The difference in status of the advocate and clerk is considerable, especially in the eyes of the wider community where, although they are all men of standing, they must describe themselves as 'clerks' a designation now more lowly than it was in the Middle Ages. However, much of the descriptive terminology at the Parliament House and in Scots Law is misleading to the outsider. The Lord Justice Clerk is the second of Her Majesty's judges in Scotland; the office of Sheriff-Substitute, although the individual no

7. George C. Homans: 'Social Behaviour: Its Elementary Forms'. Harcourt, Brace & Wald, 1961 at p.129

longer substitutes for anyone, might also seem a lowly status. The in-group know the exact standing of its members. The clerks enjoy a certain prestige and often acquire great esteem, not only within their group of four, but among the advocates and solicitors.

The social control is complete because of the size of the group and because of the visibility of all in their role-relationships. Norm-breaking can very readily be seen if it should occur, and, with the exception of a few deviants, who were frequently named by both clerks and advocates, there was consensus of opinion that few of either group even wanted to break the rules. Some did, but rarely tried more than once. A very small minority would be expected to break the rules when they thought they could do so unobserved. As this freedom from observation was virtually an impossibility, those very few persons were seen as deviants and it was frequently said that they either had conformed or would eventually conform. The relatively informal nature of the interaction of advocates and clerks at Parliament House and in many informal activities, their familiarity and friendliness, breed no sort of contempt. There exist minor criticisms on both sides but a most unusual loyalty exists between the two sets of people if any question is raised of any misdemeanours, with the exceptions already noted of a few deviant individuals. It was impossible to find any rooted belief that there was any fault in the system beyond small day-to-day failures of activities or communications. The uniform and predictable actions seen in daily behaviour seem, as is stated to be the case, to continue undisturbed and imperturbable.

The possibility of the existence of role-conflict and role-contamination arising out of early interviews and information proved, as has been said, to relate to individuals and not to the institutions themselves. The role of

the advocate can hardly be seen as grayer after an examination of this set of role-relationships and again the main feature patterning and controlling the situation is the smallness of the group and its structural relationship to the system of which it is a part.

The Advocate and the Solicitor

Both professionally and socially it is with the Edinburgh solicitor rather than with solicitors in general that the advocate mainly interacts and especially with those Edinburgh solicitors who do court work. A large number of Edinburgh solicitors do no Court work at all. Only solicitors practising in Edinburgh and Leith have the right to practise in the Parliament House. Those who practise in any other part of Scotland must appoint an agent in Edinburgh to act on behalf of their clients in the conduct of a case in the Court of Session. Thus if the client lives in Edinburgh he goes to his solicitor, who advises him and, if it is necessary, takes the opinion of counsel, and, again if it is necessary, instructs counsel to appear in court. If the client lives outside Edinburgh a further link in the chain is necessary. His solicitor may advise him and take counsel's opinion on his behalf; but if counsel's services are required in the Court of Session the client has the expense of employing an Edinburgh solicitor as well as his local one. If the case goes on final appeal to the House of Lords yet another firm of solicitors will be engaged - a London firm. (Even an Edinburgh client will have to employ London solicitors for an appeal to the House of Lords in addition to his Edinburgh solicitors.) So the client who lives out of Edinburgh may end by paying three firms of solicitors in the course of one case and, if English counsel are instructed for the House of Lords, there will be three barriers between him and the counsel who conducts

the case. It should, however, be stressed that professional norms at every stage operate to restrict rather than promote litigation. Solicitor and advocate alike will discourage a client who has little prospect of success from beginning or persisting in an action. Frequently they will advise a client with a good case in law to accept a reasonable compromise settlement. Of these links in the chain between the advocate and the client it is the Edinburgh solicitor or agent who is most important in the consideration of the advocate's role-set. The advocate may know many country solicitors and may be sent many briefs by those from his own part of the country. In the case of advocates with connections in Glasgow this is particularly true, since a great deal of litigation and court work originates in that city. It is frequently possible to guess an advocate's city or place of origin by noticing the cases in which he is involved. He will meet these out-of-Edinburgh agents at consultations and when he attends at cases in the Sheriff Courts in their areas, and may have kinship ties with them as well as a considerable interaction outside the realm of his work. He may not know them at all. And his interaction with them at the Parliament House will be negligible.

It is with the solicitors he may meet daily that he is most concerned. They form the links between him and the country agents and, although he may be chosen personally by the country agent, in most cases it is the Edinburgh solicitor who chooses counsel. The larger Edinburgh firms normally have a Parliament House partner (or partners) and a Parliament House clerk. In the smaller firms the partner himself or one of his qualified staff will attend at the Parliament House when the firm has a case in hand. All these men form one of the most important elements in the advocate's role-set. Counsel is the specialist, in status the superior, yet the solicitor is the patron. Conflict might indeed

arise in such a situation. The structure of the group and of the two parts of it, it will be suggested, make such conflict unlikely. But first it is necessary to describe some of the relationships, activities and interactions of advocates and solicitors.

Because of the nature of the Scottish system of legal education members of both branches of the profession will have attended classes together at Scottish universities (usually in terms of the most relevant part of the role-set Edinburgh University but by no means always). In such a situation the men of any generation will make social contacts at the outset of their careers with law students who may join either side of the profession. Many do not decide which to join until a late stage in their law degree or indeed until it is finished. In the Scottish system the choice of career pattern does not have to be made before professional training begins as it does in England with barristers and solicitors. Many of these students will also have been at school together at one of the larger boys' day schools in which the city abounds. Many will have kinship ties. The social network of the future advocates and solicitors is already close. There is little class difference between them. Most are middle-class, a very few upper-class (there is one son of a Duke in this year's intake) and a few lower-class. In any of these groups any individual may choose the advocate's or solicitor's branch of the legal profession. To choose the former money must be found but there are scholarships and grants and a proportion of advocates practising today come from lower-class families or from middle-class families with very low earnings (for example, sons of the manse).

The relationships formed at this stage and those already existing continue between the advocate and the solicitor practising in Edinburgh and in the

Parliament House in daily intercourse of a professional and social kind. Of course all advocates do not know all solicitors, even those who practise in the Parliament House, but all advocates do know some solicitors very well, many as acquaintances or instructing agents and most of them at least by name. This is a small, close-knit group of high social density. The role-differentiation is by function and is so because the structure of the legal system as it developed demanded the differentiation.

It may be interesting to note here one small item of social change which might suggest a decline in the deference paid by the solicitor to the advocate. It was formerly the custom in the letters of instruction to counsel to use the third person. Thus the letter might read: 'Messrs. A, B & C present their compliments to Mr X and beg to inform him that this case is No. 1 of Lord M's Roll for Proof on Saturday, 7th April 1965. The agents will be obliged by Counsel attending on behalf of the Pursuer', and so on. Now the first person is more usual as in: 'Dear Sir

Jones v. Brown

On the instructions of our correspondents, Messrs. A, B & C. we enclose for the favour of your opinion a memorial and other papers as per inventory in the above matter.

Yours faithfully,'

The first type of letter is now rarely sent. The informal would appear to be driving out the formal.

Unlike the advocates the solicitors have no right of audience in the Supreme Courts but they undertake most of the forensic work in the Sheriff Courts, which have a very wide civil and criminal jurisdiction. Thus many solicitors have to develop the same skills and perform the same functions as advocates. This has led recently to pressures that the two branches of the profession

should merge as has been described elsewhere. Solicitors can move easily across to the profession of advocate (this is not allowed in England) after they have been purged by the 'idle year' in which they may not work for remuneration and should serve as pupils or 'devils' to advocates. Except for this apprenticeship their qualifications are usually suitable for membership of the Faculty.

The solicitor has other skills not used by the advocate, for example in conveyancing and land law and other functions in his closer relationship with clients. Every step of process, in such matters as summonses, defences, closed records, lists of witnesses and productions, is lodged by the solicitor. This keeps the advocate's role clean in dealing direct with the Court and not with the Clerks of Court. It also means that the advocate's clerical work is minimal and contributes to the remuneration of the solicitor, who is paid for each of these steps in any action. The clearest symbol of the advocate's role, the wig, is not worn by the solicitor and in modern times, at least in unimportant cases or in the smaller Sheriff Courts, he may not even wear a gown. As a rule, all but the older and/or grander members of the profession dress more like businessmen than like advocates, though in some Sheriff Courts, where a case is being heard before a jury, there is a practice for solicitors appearing to wear wing collars and white bow ties. Some few solicitors become sheriffs-substitute and by the Acts of Union a Writer to the Signet could become a Judge of the Court of Session but in fact none has done so. Because they have no right to plead or to be heard in the Supreme Courts they cannot become law officers of the Crown. In 1924 the Labour Government had no members of Faculty in Parliament and wanted to appoint a solicitor as Lord Advocate. This was seen to be impossible. There was further discussion of this

matter in the House of Commons in 1962 when the Conservative Government was in the same position. Again it was found to be impossible. The functions of the two branches do overlap but are different in many particulars, and the arguments for and against a merger are many and diverse. A social anthropologist would perhaps find more reason for retaining the present division than would meet with the approval of most solicitors.

In fact the solicitor is further removed today from the advocate image than he was thirty or forty years ago. He may be nearer to his original role. He started as a 'man of business' or 'doer' and once again, even in the outward symbol, his dress, is becoming more like one. When he is engaged in commercial matters he may be a specialist in the business world where the advocate might be described as the general practitioner. This type of solicitor tends to avoid litigation as much as possible. Perhaps if he were entitled to conduct and benefit from the litigation the community would be the loser.

The solicitor is the intermediary between the client and the advocate, though he does not fit into Goffman's⁹ categories of the 'go-between'. It is easier to see the clerk in this way than the solicitor. One clerk informed the writer that a distinguished Judge had described him as an entrepreneur. The client goes first to his solicitor if he has a legal problem and the solicitor advises him. The advice may be that Counsel's opinion must be taken. This is done and Counsel may advise court action. The solicitor interviews his client in the light of Counsel's opinion and interviews the witnesses. In more important cases there will often be a consultation with the advocate which will be at his place and time of choosing, usually arranged through his clerk, to which the solicitors will bring the client. Otherwise the advocate

9. Erving Goffman, 'The Presentation of Self in Everyday Life', pp. 149-151

may see his client only briefly before the Court appearance. At the end of the case the solicitor is often left to deal with a disappointed litigant; only if the case is successful will the advocate sometimes be at hand to receive thanks and congratulations.

Some aspects of the consultation are described elsewhere, and need not be repeated here. One interesting point of etiquette and symbolic behaviour may be noted. A senior member of Faculty told it in the following words. 'I always shake hands with the agent and the country agent when I show them out. Counsel never shake hands' (scil. with each other). He added at the end of the interview as the writer made to take leave with a handshake 'Counsel never shake hands - nor do counsel's wives with counsel'. The apparent deference towards the patron is in fact a sign that he is not in the in-group, cannot share its customs and must be shown more overt courtesy. The factor of social distinction is here evident in a rather unusual example. The naming customs in such a situation also show social distance. The solicitors will be called 'Mr' or by any other title they may have, as will the client. Except when acting their roles in the presence of those outside the group advocates (Senior and Junior counsel) will use last names only to each other as is the custom at all times, except when first names are used in circumstances of less formality. Junior advocates in all situations would show much more deference to older solicitors than they would be expected to show to the older or even elderly members of the Bar. On looking at the behaviour patterns without a knowledge of their structural significance it would be easy to suppose that deference was being paid to the patron as patron, in return for work received or in the hope of work to come. In fact the opposite is true - deference is paid to an inferior, one not admitted to the rank and therefore to the symbols of the more

exclusive group. Advocate and solicitor may interact outside the Parliament House on terms of friendship or intimacy arising out of factors which have nothing to do with their professional roles. Their relationship may well go back to school or student days, and both branches of the profession, as has been noted, attend the same University law classes. Membership of the same social or golf clubs in or near Edinburgh also decreases social distance. When, however, there has been no apparent spontaneous reason for close association, such as long standing friendship or living in the same social milieu, an advocate who seems to take the initiative in cultivating the acquaintance of solicitors may incur the Faculty's disapproval. An advocate who is seen frequently playing golf, drinking or dining with solicitors who can influence his career may be the subject of gossip. This is realised by the Bar whose consequent reaction not infrequently creates social distance between its members and those of the solicitor's profession. As a counterpart, solicitors who do not have close acquaintances at the Bar will observe that advocates 'don't mix' or that they are 'snobbish' or 'stand-offish'. It is in fact the fear of gossip or disapproval of their brother advocates, anxiety lest they break one of the strictest professional taboos, which may cause a member of Faculty to behave in a somewhat formal and distant manner to those who are in a position to instruct him.

In the wider community the solicitor may sometimes rank higher than the advocate in terms of birth, wealth, and long family professional traditions. There is a large 'Establishment' group of solicitors in Edinburgh, more than elsewhere in Scotland, though in most cities or districts they can be found. These and the upper group at the Bar interact more with each other on the whole than either group does with other groups in their own branch of the profession.

The Society of Writers to the Signet is the most distinguished and oldest society of Solicitors in Scotland and members of it are part of the College of Justice. This is symbolised by the fact that in the Lord Lyon's list on protocol this Society takes precedence over the Law Society of Scotland. The writer has been told more than once that 'many of those in the W.S. society are a lot more "snob" than the Bar'. The group indicated by this kind of remark are frequently of old Edinburgh legal élites, often having ancestors who were judges or advocates and having sons who may join either side of the profession. They can hardly be described as typical of solicitors as a whole.

The patronage of the solicitor towards the advocate has been noted. The law agent has in his gift all the cases the advocate craves. On the whole the eventual success of the advocate at top level comes with ability and hard work. There are, however, many factors involved at the outset of the advocate's career - luck, chance, kinship, or social connections with a solicitor or his family, place of origin and the capacity to make good in the first cases he is given. The solicitor and clerk form a close but informal association in the matter of briefing counsel. The solicitor is aware that the clerk knows nearly as much about the abilities and qualities of counsel as he does himself, and the clerk's advice and suggestions are usually welcomed and invited. Solicitors may even choose their 'own' clerk in the sense that they want to keep their work in his 'family', and when a chosen counsel is engaged elsewhere will demand that, rather than go to another clerk's list, the clerk find them out from his own.

There is no doubt that influence with one or more solicitors plays some part in the advocate's success. But in what sphere of life does it not?

Michael Banton writes:¹⁰ 'British policemen continually allege, "It is not what you know but who you know"... If people believe that promotion does not necessarily reflect merit then it is no disgrace to fail'. "There's many good men still walking the beat", policemen say.¹¹ Melville Dalton has noted the same statements in relation to business and industry, and suggests that 'pull' is even more important in the professions. Advocates in their own way say much the same thing. Influence, however, is not enough without some other factors. If even the most influential counsel fails to make a reasonable showing on important cases his influence will wane. The solicitor has a duty to his client and cannot take the risk of losing the client's case. The observation and condemnation of the clerks and other frequenters of the Parliament House would also have great control over the solicitor were he to persevere in the briefing of incompetent counsel. The fact that a great deal of the work, especially at the outset of a career at the Bar, can be done by any advocate who is properly trained and hard working does, however, mean that some men, no more able than their peers, have very large practices when others have little work.

The solicitor tends to employ the 'devils' of counsel he has always employed. Thus a 'devil' if he is clever will choose as his master a man who is about to 'take silk' in the hope that his master's junior practice will at least in part come to him. This is a common way of achieving early success and might be given in 'Advice to a Young Advocate'.

Bearing in mind that, as in any system, preferment can be affected by influence as by chance or luck, there is no evidence to suppose that there is any corruption in the solicitor's wielding of his patronage. His professional

10. The Policeman in the Community, p.165.

11. Melville Dalton. Informal factors in Career Achievement, p.407.

ethic, his duty to his client and the social control exercised by the role-set in the Parliament House, make such a possibility unlikely. The last factor must once again be stressed, that the size and closeness of the group is probably the greatest factor in preventing role-conflict arising or role-contamination occurring.

The description of the activities in the wider world which bring even more closely together this small community within a community applies in much the same way to the solicitor as to the clerk although the status of the solicitor is higher and, as there are very many more solicitors than clerks, it is more difficult to see them all as acting to the same pattern. They interact socially with advocates and clerks, marry with their families, entertain and are entertained by them, play golf or other games with them, belong to the same clubs, for example, some to the All Spheres Club but many more to the New Club, the Arts Club and the United Services Club. It is interesting to note in this context that, whereas certain members of the Bar objected hotly to the All Spheres Club as being a possible contaminating factor by providing a meeting ground for advocates with solicitors, many of these same advocates see nothing at all amiss in belonging to the New Club, the most upper-class of the Edinburgh clubs, whose membership includes large numbers of advocates and solicitors. In many cases their families have been members for generations, and it is assumed that anyone joining is not doing so in order to meet and influence solicitors. It would quickly be seen and remarked on as 'bad form', were professional considerations uppermost in the behaviour of a member. Upper-class behaviour prohibits this kind of 'touting for work', even if professional behaviour should weaken. It may be that the critics of the All Spheres Club were afraid that it had not had enough time to establish such traditions and that contamination might

therefore set in; it may be that motives of class and snobbery did in fact inform some of the criticism. As it is the writer cannot suggest that either institution does contaminate the advocates' role, nor would nor could be likely to do so.

The solicitor's own professional ethic, plus the solidarity and high social density of the group yet again leads to the conclusion that, with the same exceptions of known deviant behaviour the advocate's role in relation to his professional colleagues, the solicitor, is so structured that their interaction in their separate roles lacks any real conflict and rarely leads to any kind of contamination.

Merton points out in the paper quoted at the beginning of this chapter that the greatest potential for role-conflict is that the members of the role set tend to be¹² 'diversely located in the social structure, they are apt to have interests and sentiments, values and moral expectations differing from those of the status-occupant himself.' It seems to emerge from the study that this is not true of the clerk and solicitor aspects of the advocate's role-set. They are not 'diversely located in the social structure.' There are kinship ties relating them across the barriers of differing statuses; advocates' and solicitors' families frequently intermarry; one advocate at least has married a clerk's daughter, and one clerk's son is himself an advocate. Their social ties and social networks in the wider community frequently overlap and they appear not to have 'interests and sentiments, values and moral expectations differing from each other.' Thus structurally little role-conflict would be expected and in fact little or none has been found. The high social density

12. Robert K. Merton, 'The Role-Set: Problems in Sociological Theory' (1957) 8 Brit. Journal of Sociology 112.

of the whole group - and judges may be included because, although their relationship has not been fully described, it must be remembered that every one of them proceeded from the Bar to the Bench and their role-set and social network is therefore similar to that of the advocate - ensures great social solidarity and little chance of role-conflict and the high visibility among all the members of the group further ensures its role-cleanliness.

In his relations with the client outside the Parliament House the advocate's role is so structured as successfully to prohibit any possibility of conflict or of contamination. Counsel must be approached through the mediation of a solicitor. The client has, or should have, no direct relationship with the advocate in person, in writing, or by telephone but must employ a solicitor as intermediary. The advocate is in full charge of the case while he is retained and cannot be obliged to follow his client's wishes in respect of the case if they conflict with his own. He can, for example, refuse to call his client as a witness in his own interest or in his own defence, he can refuse a client's wish to attack a witness, and most important he must refuse to falsify what he knows to be true. His fees are paid by the solicitor and not directly by the client himself, and he is the sole judge of his conduct unless it transgresses the rules of his profession or of the court.

There is an interesting anecdote of a now deceased Dean of Faculty who when he was conducting a consultation in his own house had an opinionated and recalcitrant client. This man voiced an opinion contrary to that of counsel. This was ignored and the client was asked to keep quiet. He shortly afterwards ventured a further opinion, whereupon learned counsel rang a bell for attention and ordered his servant to show the client out of the house. This was a perfectly proper, though unusually overbearing action.

Such behaviour as contravenes the norms of this advocate-client relationship is usually of the deviant sort and does not often occur. It has been noted above that T.H. Marshall¹³ sees the actor type of barrister as a deviant and the least professional of lawyers. This kind of advocate, as has been noted elsewhere, is rare in Scotland and not regarded with the highest esteem. Another form of deviance which has been observed, and is the subject of comment, but is also rare, is the over-identification of the advocate with the client in the conduct of his case. This could lead the advocate to forget his duty to the court and to his profession and is strongly condemned. It loses the offending counsel the esteem of his peers in the first place because it goes against all their training and socialisation. (American lawyers are astonished by the restraint with which Scottish advocates present their cases). In the second place it offends because it could be seen to be attempt to corrupt the legal system itself; and finally it is a fault because if advocates were to persevere in such behaviour the group as a whole would lose prestige and would be seen to fail in its duty. This form of deviation can be seen as an aspect of undertraining. A most amusing account of another form of under-training is given by Henry Cecil in his book 'Sober as a Judge'.¹⁴ 'Mr Meldon had only recently been called to the Bar but he was a little over thirty. It very soon became apparent that, before being a barrister, he had been a high pressure salesman.

'My Lord', he opened, 'This is a claim which will cause your Lordship no difficulty at all. Of that I can assure your Lordship. I have two witnesses who will only have to be seen to be believed. They are both persons of the strictest integrity and their memories are

13. Sociology at the Cross Roads, p.158

14. p.159 et seq.

extremely good. Your Lordship will be able to rely with confidence on every word they say'.

The judge eventually recalls him to the case - 'Your duty and your only right.... is to make submissions to the Court. You are not allowed to give me the benefit of your own opinion, however valuable'. Counsel proceeds to state facts about his clients of a flattering and irrelevant kind rather than to lead evidence and when he is again recalled to the presentation of the case expostulates, 'then the pep talk comes later?'

Such minor instances serve to give point to the claim that the norms of the advocate client relationship are almost always observed. The whole social structure would be impaired were they not. The possibility of conflict and contamination is remote. The solicitor and clerk as intermediaries demonstrate the advocate's segregation from one form of possible corruption; his status as an officer of the court and his status within the system of law he helps to administer; his status as a member of his profession, all ensure that he will play a role of a suitable kind towards his client. The system is structured in a way that makes role-breaking difficult and ensures the visibility of role-breaking on the rare occasions when it does occur.

The system itself, its structure and its symbols are known and seen by the role-set. The roles are so clearly defined and have been so for such a long period of time that the individuals who play them do not need to feel concerned about their prestige and self-esteem. Distance does not have to be observed because it is structurally clear and objectified in many symbols. Personal relations are more important than, for example, considerations of class. The social density is high because relations are based on conventional understanding and clearly symbolised. This group, whose well-defined structure

has developed and existed for so long, is a particularly good, if not an unique example in an industrial society of a system structured in such a way that role-conflict is absent and role-contamination rare.

ROLE PRESERVATION

An attempt will now be made to list and analyse some of the devices by which the role of the advocate is sustained and kept from contamination, the devices which uphold the ideal image of his professional role and help him to follow the norms laid down in the ethic of his profession. The possibility of there being weak spots in this system and the points at which the ideal might be less than fulfilled will also be examined.

The separation of function in the advocate's role-set is the primary device which preserves his role from contamination though, paradoxically, the solicitor and clerk may have the same or some of the same skills and the same education, the advocate's function is separate and distinct. An advocate may not do a solicitor's work just as a solicitor has no right to plead in the highest courts. This separation of functions and the resulting prestige accruing to the advocate is reflected in the convention that the advocate consults in his own home, or at a time of his choosing in the Parliament House and does not go to the solicitor's office at the solicitor's bidding. The implication of deferential treatment in this is obvious. It also seems to bear out another finding of anthropologists from studies of simpler societies. It has been noticed that in determining roles, in watching their fulfillment within the social structure, the actual rights and duties of persons can be observed as following a certain pattern of superordination or subordination. If a simple, patrilineal society such as the Tallensi is taken, it can be seen that the material duties of the father (the superior) are greater and the conventional duties of the son (the inferior) are greater. The deference paid by the inferior to the superior can be seen to be partly based on material

benefits given by the superior. In the case of the advocate's consultations, he is conferring the material benefit of providing the place of meeting, thus in one of many ways showing his superiority and his expectation of deference.

Among the most important devices for role-preservation is certainly professional training, both in technical matters and in more general 'socialisation'. The professional training of the advocate has already been described in general terms and here it is only necessary to relate a few of the factors to the general theory of the present chapter. In its broadest sense the advocate's training goes far beyond the testing of technical and professional competence. The first stage of his training is (practically invariably) at a University where he takes a degree in Arts and Law. Pressure from the solicitor's branch of the profession in particular has made it possible to qualify as a solicitor without any knowledge of Latin; but it is still virtually impossible for an advocate to be admitted without some grasp of the rudiments of Latin and he must also offer proof of general scholarship as well as of law at University level. Though some solicitors acquire an equally broad education, the majority do not, and therefore the advocate at an early stage is distinguished from most other lawyers.

Though there are no professional law schools outside the Universities, the influence of the legal professional is apparent in the Law Faculties. Though the Oxbridge and London law teacher in Scotland may dress like his colleagues in Arts or Social Sciences, those teachers who are advocates tend to dress formally in dark suit and stiff collar when they meet their classes. The author has been told by some that this practice is deliberately followed to instil a professional image. Perhaps significantly Scottish Law Faculties do not offer courses in professional ethics, though from time to time a law

teacher may comment (often from his experience) upon conduct which he would regard as dishonourable. One Scottish advocate-teacher was surprised that the Dean of a distinguished American Law School should have welcomed the new 'intake' with a speech which warned them against mingling clients' money with their own. Considerable use is made, in Edinburgh University particularly, of young advocates as part-time law tutors. These tend to be employed by 'advocate-professors' to help the young advocates in the lean years, and the out-of-court 'uniform' of these young men clearly identifies them as a separate group. There is a certain resentment against this among some sections of the University teaching staff, mainly because they are so obviously 'advocates' first and 'teachers' second, and in large measure it tends to keep to itself in the Staff Club. The sociological reasons for this are clear. The advocate is a member of a close professional association of high social standing in which the main part of his career will be made. He looks upon his university tutoring as an unimportant part of his professional life and must therefore seem like a rather over-favoured interloper to those who have chosen to make their entire professional career in the University.

After training in the law as such the next phase of a young advocate's training is as a 'devil' when he will learn professional skills mostly of a practical kind. He will have an intimate association with his 'devil-master' in all the latter's professional work and this aspect of his training is highly important in inculcating a standard of behaviour covering both ethics and etiquette. Much will be learnt by observation, much by imitation and a good deal through discussion of problems in private conversation. Unlike the apprentice solicitor or apprentice chartered accountant, the young advocate's association with his master tends to cover the whole working day. Naturally, therefore,

he is much more likely to model himself on his 'master', especially as the mutual selection of 'master' and 'devil' is essentially voluntary, and in the first place is largely determined by an admiration of the younger for the older man.

Oswald Hall, discussing 'The Informal Organisation of the Medical Profession', concludes that the established members of a profession set up an organisation and 'will develop an orderly manner of incorporating new members into their community, of repelling the unwanted or the intruder....To call such an organisation "informal" implies that it does not originate by establishing a constitution....It is an assumption....that the working constitution of any established profession is something that has to be discovered. Moreover, it is likely to deviate considerably from the formal constitution.'¹

So far as the Faculty of Advocates is concerned, there is no doubt that an informal organisation has not only developed but is of the greatest importance in preserving status and propagating an ideal image. Nevertheless once a man has been accepted as 'devil', though not yet a full member of the profession, he has a certain status within it and is subject to some of its ethical rules - as, for example, confidentially regarding his master's papers and consultations. It may be remarked that neither client nor instructing solicitor has any say in the 'devil's' participation in their affairs. No case is known in which a 'devil' has abused his position, nor of the Faculty excluding a person after he had acted as 'devil'. In theory no doubt a 'devil' (if, as is usually the case, not yet fully admitted to the Faculty while devilling) could be blackballed at the Public Examination. No case has been cited to show that this has ever happened.

1. Oswald Hall, p.32.

At the stage of 'devilling' the process of socialisation will be most pronounced. Goode² has observed that 'as a consequence of the rewards given by the larger society, the community of profession can also demand higher talent in its recruits and require that they go through a considerable adult socialisation process.' Again,³ he says, 'socialisation and social control are made important by the peculiarly exploitative opportunities the professions enjoy.' In the case of the Faculty of Advocate the compulsory adult socialisation process is restricted to the quite short period of devilling, but socialisation - and therefore informal control - continues long thereafter, day in, day out and for many years in close association and conversation with his brethren. The constant interaction with the others in his role-set in the advocate's daily life in the Parliament House contributes too to his process of socialisation.

Even after an advocate has been in practice for a good number of years, he may be confronted with a delicate problem regarding which the professional norm is not clear to him. He will therefore probably discuss it with intimate and experienced friends, however large or small its apparent importance. One informant, who had been over fifteen years in practice, found himself in a situation in which he considered that his professional position was embarrassing in relation to the Dean of Faculty. He turned for advice in this very unusual situation to the Vice-Dean, who was able to recall a comparable incident which had occurred some thirty years before. The advice was given, received and acted on in complete confidence. Again, an advocate who had also been admitted to the English Bar was anxious to conform on admission to Faculty

2. William J. Goode, Op.cit. p.196

3. ibid.

etiquette regarding dress. In the English Courts, including the House of Lords, he had worn a gown similar to an advocate's, except that it had a purse and streamer which in Scotland are only worn by an advocate who has appeared in a House of Lords Appeal. This barrister-advocate invited and accepted a ruling that until he had 'won his spurs' (scil. the purse) in a Scottish appeal to the Lords he should not wear it in the Parliament House. The equality of all and the small rites de passage by which added experience or esteem are noted are clearly signified yet again.

Role symbols such as costume and naming can be clearly seen as devices for preserving and demonstrating the status of the person. The advocate's distinctive garb in court, described above, and utterly unlike the ordinary dressing in the 1960's, sets him apart in his work role from the rest of the community. To the layman, this distinctive costume is immediately recognisable so that even he, in all the strangeness and, no doubt, awe of a court of law can tell his advocate from his solicitor. To the layman, also, much of the awe inspired by the courts of law is induced by the setting apart of Judges, Counsel, and Officers of the Court by their odd and unusual dressing customs. Thus one function of these customs can be seen to be the inducement of a considerable respect for the law itself. But another function can be seen as inducing respect for lawyers, or that branch of the profession which has the sole right to plead in the highest courts. A solicitor pleading in a lower court should, according to tradition, wear a gown over dark clothes, but in practise in many smaller courts and in unimportant cases he nowadays frequently does not wear the gown. That prestige, esteem and deference are all related to this setting apart of the advocate, especially in the mind of the layman, can be easily observed and checked by the enquirer in the field. Most clients appearing in court questioned by the writer had little if any knowledge of the

actual structure of the legal profession. All, though not knowing the difference between their 'lawyer' (solicitor) and their 'counsel' (advocate), felt the latter to be of higher status and of more significance in the conduct of their case. Questioned further, clients talked of the dress as being very significant in giving importance to the advocate's role, besides suggesting that they clearly saw him as the 'expert' brought in at the end to do the real work of the problem - solving.

Within the legal profession itself and its role-set these matters are seen rather differently. The comparative lack of social distance between individuals makes the actual award of prestige and esteem rather more accurate.⁴ Nevertheless, it is suggested that the advocate's distinctive dress, and the fact that it is both a sign and a mandate for his special position within the profession, contributes to giving him a higher status and more deference than he would otherwise have.

An aspect of social behaviour which always gives an indication of the role relationship is the naming system in the group. The advocate as has been described⁵ follows rigidly the custom that all professional colleagues are ostensibly equal and this is reflected in the way he names his brethren. The writer found in the telephone directory of 1964 only one advocate who designated himself 'Q.C.' All others followed the custom of calling themselves, 'A.B. - Advocate'. Professional associations commonly have a minimum of ranking and the assumption is made that, having qualified professionally, all members are equal. This equality is reduced by the greater skills and success of some

4. The distinction between these first came to the author's attention in the Ph.D. thesis, later published as Westrigg: The Sociology of a Cheviot Parish of Dr. James Littlejohn, who attributes the differentiation to K. Davis, 'Conceptual Analysis of Stratification', Amer. Sociol. Rev., 7 1942, pp. 309-21.

5. See p.93 supra.

members who acquire greater esteem than others but the prestige of all is assumed to be equal in the eyes of the outsider. As has been described the Scottish Bar since 1897 has followed the English practise of accepting that the status Q.C. may be given to senior members. Though this would seem to introduce inequality it in fact does so more in the eyes of the layman than in the group itself which is well aware that the taking of silk in Scotland depends more on length and adequacy of service than on outstanding success.⁶ Thus social solidarity in the professional group is maintained and is seen to be of the greatest importance. The outsider at least must be made to believe that all members of the profession have the same status and prestige. The greater the social distance of the outsider from the group, the more this will seem to be so. It is interesting to note in this context the growing custom in the Scottish press of describing all counsel as 'Q.C.' This may be because the journalist is aware of the ignorance in the public of the meaning of the word 'advocate' and may be a shortcut for him in distinguishing that particular type of 'lawyer' from the others. It may be a reflection of the recent public taste for detective fiction and television accounts of great Counsel. In according to all advocates the designation 'Q.C.', the press might be seen to be reflecting a public image of the high status accorded to the person pleading for a client in a court of law. The profession's own lack of advertising is complete. But as long as society in general sees, as it seems to do, the advocate's role as dramatic, expert, critical, he will command considerable space in the newspapers without having to buy it. As Adrian Taylor has said⁷ 'neither the aims nor the mechanisms of Justice are simple.

6. See also pp. 180-1.

7. Paper read in Anthropology Seminar. Edinburgh, December 1964.

The popularity for writers and film makers of the Courts of Law.....is due not only to the ritual but to the ritually played-out drama where value wrestles with value beneath the values of the law itself.'

Those who interact with the advocate at a very close range will see the situation in a different way. The judge, the solicitor, the clerk, the members of the community at no social distance from him will have a fairly clear view of the actual esteem in which he is held, what his skills are, how great the volume of work he is briefed to do, the measure of his success both in the cases he conducts and in the income he receives from them. This is true of all professions. It is also true that the professional image is deliberately one of equality, between colleagues and the bureaucratic, hierarchial, ranking system is seen to be excluded through such devices as similarity of dress and equality in naming.

The advocate is in many aspects of his working life physically segregated from the rest of his role-set. This, by establishing an avoidance system, helps to sustain his role. He changes from street clothes to his working clothes in a Robing Room into which only advocates or their servants may enter. His places of working, the Law Room and The Corridor are reserved for advocates alone, as is the Reading Room where more general literature, newspapers, and learned journals may be read or consulted. The books in this room are supplied from the National Library of Scotland next door. The reason for this privilege is that the National Library was originally the Advocates' Library, having been established by a former Dean, Sir George Mackenzie of Rosehaugh, who was also King's Advocate in the reign of Charles II. It was given to the nation by the Faculty in 1926. Anyone who was a member of Faculty at that date still has the right, enjoyed by all members of Faculty then, of borrowing books from

the library; those called to the Bar after the transfer have no borrowing rights, but only the same reading rights as the general public. The Faculty still has the right to have their Reading Room stocked with new novels, biographies and general literature from the National Library. Many advocates' wives comment on the fact of their husbands being so up-to-date in their general reading, with certain wry remarks as to the amount of 'work' that is done in the Parliament House. But more important, it must be noticed that this is a privilege reserved for the Faculty alone and from the Reading Room other frequenters of the Parliament House are excluded.

In the matter of commensality the Faculty is significantly segregated from all the other users of the Parliament House. The Judges eat together and separately from everyone else, as well as having their own Robing Rooms. The Advocates have a separate Coffee Room and Lunch Room. Solicitors and Clerks, if they take coffee or lunch in the Parliament House, eat in the Public Restaurant. So yet another symbol of the separation of the advocate's role from that of others with whom he works can be seen.

A further example of his physical separation from this nearest colleague, the solicitor, can be seen in his position in Court where he sits immediately behind the Bar and in front of the solicitor. This would clearly appear to symbolise his superior status as a factor in itself and would certainly suggest to a layman some superiority in his rank.

The advocate is a member of the College of Justice and an Officer of the Court so he has a triple duty; to the court, to his client and to his profession. He cannot or does not sue for his fees and he cannot be sued for professional negligence.⁸ He can be disciplined by the Dean and the Dean's Committee who

8. See pp.103-5. Very recently there have been doubts raised regarding counsel's immunity from action in respect of professional negligence.

are the custodians of the rules of professional behaviour. This possibility of formal censure is, for the advocate, less likely and less important than the informal censure he may meet from his fellow advocates if he transgresses in any way the mores of his calling. The strength of this pressure and the relevance of these sanctions as one of many ways of preventing role-contamination is due in a large part to the smallness of the group and to its structured relationships. It has been explained that the difficulty of entering the group could be seen to be financial rather than intellectual, and in fact the number of advocates practising at the Bar has remained fairly constant in the present century. Whether by design of the Faculty or because no larger number would make an adequate living or because no larger number of individuals in the community is likely to be able to afford the hazardous and, in its initiation, expensive burden of an advocate's early life is difficult to determine. The fact is that the group is small, of its nature homogeneous and the result of these factors is one that the social anthropologist could predict; informal sanctions are strong; norms are clear and known to all; ignoring or breaking these norms is visited by the censure of the group. Sanctions may be in terms of joking, gossip, avoidance. They have rarely been in terms of formal expulsion.

The disciplinary powers of the recognised tribunals of most professional groups are subject to the ultimate control of the judiciary. Thus appeals lie from the General Medical Council to the Privy Council, from the Benchers of the English Inns of Court to the High Court (sitting as a domestic tribunal) and solicitors in Scotland are struck off the roll by the Court of Session after investigation by the disciplinary Committee of the Law Society. It seems clear that the Court of Session has the right to censure, suspend or deprive

advocates of their office for unprofessional conduct. These powers have not, however, been used in modern times.⁹ There are two reported instances in 1649¹⁰ and 1699¹¹ of advocates being deprived for acquiring an interest in the causes for which they had been employed professionally - contrary to the Act of 1594¹². The right to censure, suspend or deprive of the right to appear before them may also be exercised by inferior courts, subject to the supervision of the Court of Session.¹³ All these cases go back to the Seventeenth Century and the most recent treatises, such as those of Mackay and McLaren on Court of Session Practice cite no later examples. In more modern times the Faculty itself has censured or struck off the rolls members guilty of grave professional misconduct or crime.¹⁴ The last instance cited appears to be 23rd January 1872. It would not seem that an advocate thus deprived has right of appeal to the Courts. On the other hand the Legal Aid and Solicitors (Scotland) Act¹⁵ gives a right to an advocate to appeal to the court against his exclusion by the Faculty of Advocates from the Legal Aid lists for professional misconduct.

The approval or disapproval of colleagues can be reward or punishment enough. The esteem gained by blameless professional behaviour can be as great in many ways as the esteem gained by outstanding skill and is often greater than that gained by what the wider community sees as 'success'.

There is no written code of professional ethics in the Faculty of Advocates,

9. Mackay, Court of Session Practice 1, 114.

10. Maxwell, A.S. 21 Dec. 1649.

11. Mowat v. Cumming. 2 Fountainhall 64.

12. Act 1594 c.216.

13. Russel v. Commissaries of Edinburgh (1609) M.341.

14. Mackay ibid.

15. 1949 S. 6(2).

but the Dean and his Council are expected to give guidance in any possible conflict of duty as well as to censure formally any disobedience of the widely known and accepted rules of professional behaviour. These include, the rule against advertising in any form, the rule committing every advocate to conducting a case he has accepted even although at a later date he may have received a more lucrative brief. The Dean and his Council perform a very real function in seeing that the individual advocate and therefore the whole group keep the unblemished professional image that is their ideal. Nevertheless, it is suggested that the close attention to this ideal, likewise the lack of evidence that deviation from it passes unnoticed or often happens, is due to the smallness and closeness of the professional community. There is little chance of 'getting away with it' - anyhow more than once - and this above all ensures that the professional role will be played according to the rules.

The extension of the advocate's small, integrated world, observed and open to his colleagues, into his home life and wider social network is of great interest. As has been described¹⁶ he must have his house, or his chambers in a certain part of the New Town of Edinburgh. His wife and family constantly meet other advocates' wives and families, members of the profession, frequently entertain each other in their homes. The writer has found at many Edinburgh cocktail, dinner or evening parties given by a member of the Bar, that the great majority of guests have been other advocates and their wives. The men belong to the same clubs, the New Club, the United Services Club and the Arts Club being the most popular, and to the same golf clubs such as Muirfield. There is thus very frequent interaction in the group outside its working life. Elizabeth Bott in her London study, Family and Social Network, states that

16. See p. 93 et seq.

'homogeneous local areas of a single profession are very rare', and many American sociologists suggest they do not exist. The Faculty of Advocates in Edinburgh is certainly a fine example of this rare species. The outsider finds this small, immobile, integrated society both unusual and unlikely in the modern Western world. The closeness and intimacy with colleagues which pervades the advocate's social and home life must be seen as yet another factor leading to a marked degree of informal social control in the group. An English barrister may live as he pleases and where he pleases. His colleagues and the solicitors on whom his practice depends may not even know his home address. He has less need to 'keep up appearances', to be seen to be prosperous, outside the sphere of his work. The evidence of penury in the earlier period at the Bar can easily be hidden from all but chosen intimates. The situation in Edinburgh is very different and the amount of accurate information readily available among the group on the standing, wealth, house, education, and behaviour of any given person is great and clearly makes an important addition to the knowledge advocates have of each other as colleagues, as well as establishing bonds of acquaintanceship or friendship in the community.

This extension of group-interaction to the advocate's home or social life is one of the important features in the establishment of group-norms outside, while also contributing to the purely professional normative behaviour at the Bar.

This thesis does not attempt to make a close analysis of the advocate's home or social life, nor to relate his community to the wider community in which he lives except to note that, even more than in most small groups in modern society, social and professional equals most frequently eat and drink together, have parties and play games together. Nevertheless, it must be

noted that constant interaction between groups of colleagues and their wives clearly contributes greatly to the informal social control exercised within the professional association itself. As much as in any small community closely linked in all its activities gossip plays a large part as a mechanism of control. Many of the wives of advocates are fully aware of the professional as well as of the general social norms that govern behaviour. The writer has participated in, and observed in her own and others' drawing-rooms, much sound and some malicious and witty comment on all aspects of major and minor deviance. Perhaps it is in this sphere that more open criticism of norm-breaking is voiced. The writer has observed in a group of advocates that the suggestion by any outsider (even a wife) that any serious deviance takes place, or could take place more than once, is frowned on at once. That the advocates sometimes go so far as to criticise one of their colleagues for behaviour which is not according to the professional ideal is true. This they do almost entirely within the in-group and such criticism does control the deviant from repetition of his fault. If he is foolish enough not to be aware of such adverse criticisms he can rarely be unconscious of the loss of esteem he suffers if he pursues a course which violates the behavioural code. When outsiders (and in the context of professional conduct being gossiped about socially, wives are the most frequent outsiders) join in such gossip implying that chicanery within the group is usual or even frequent the in-group loyalty quickly asserts itself. The criticism and gossip which is informed and to a greater extent objective tends to come from those who are in close contact with the Parliament House but are not practising advocates, from academic lawyers, leading solicitors and some other professional persons, especially those who interact socially with the advocates group. Some of this criticism is noted and explained elsewhere.¹⁷

17. See p.248 *infra*.

In this chapter the writer may stress again her reason for selecting the Faculty of Advocates as the special subject for her research. From her reading of American anthropological and sociological material on the professions she found an apparent consensus of opinion that no group such as this did exist in the Western world - a group immobile, concentrated geographically, ethnically integrated, demonstrating a high degree of role preservation and few signs of role conflict or contamination. Time and again she has reflected that, however improbable the situation, it does exist. It may be exceptional: it is probably unique. She has found considerable difficulty in explaining its nature convincingly to sociologists who have studied lawyers elsewhere and to the lawyers themselves in other countries.

The critics of the Faculty of Advocates are frequently to be found in the nearest professional group to it, and may naturally be motivated to some degree by jealousy of this highly privileged association. It may be said - and has frequently been said - that 'the Faculty looks after its own'. There is much truth in the statement, though this does not necessarily imply discredit. Judges who have themselves been advocates may help their younger successors by using them to take evidence on commission; professors of law may use their patronage over part-time teaching jobs in the University; law reporting provides other opportunities. The Faculty's patronage over certain University teaching appointments has often, though certainly not always, been wisely exercised. The bad appointments are very well known in legal as in University circles. The much greater patronage of the Lord Advocate may extend to giving appointments in the quieter sheriffdoms or appointments on national bodies to advocates who are falling behind in the struggle at the Bar. Again, it is often said that 'the Faculty has too many privileges', or that it is 'too

snobbish'. These accusations are to a certain extent just. Other accusations, especially perhaps from academic lawyers who have not proved themselves to be successful practitioners, reproach the majority of the Bar as being 'intellectually torpid' and engaged in work of a pedestrian but well remunerated kind. There is truth in this also. On the other hand, however, these main criticisms do not challenge the survival and maintenance of a high professional ethic. The Faculty may be 'old fashioned' but, in discharging its functions, it shows few signs, if any, of becoming a purely money-making business. Though there are some variations in remuneration according to the esteem in which certain leaders are held, on the whole advocates are rewarded according to a tariff of fixed fees for particular pieces of work. These fees, by comparison with the rewards of the rest of the community, have not altered substantially in the post-war period. Interchangeability of function is largely preserved by this fee system, and role-preservation as many have noted is assisted by fixed feeing.

A contrast may, perhaps, be noted with current trends in the United States. Though there is a tariff for counsel's work in Scotland - and this is the usual rate paid - the impecunious client has not suffered, formerly because of gratuitous service undertaken by the Bar and now because of legal aid. When the writer visited Philadelphia in January 1963, she met and talked with many lawyers, both academic and practicing. One in particular was a very prosperous and respected member of one of the oldest law firms in a city renowned for its lawyers. This informant R. was strongly opposed to 'the new behaviour' which he had observed in the legal profession in his own country. He gave many examples, as did many United States lawyers, of how the whole ethic had changed and how consequently that 'law has become a business'. In particular R. was opposed to the local Bar Association's rules fixing fees. He believed that

many of these were fixed too high in relation to the work done - presumably to prevent 'cut price service'. The really competent lawyer, in R's view, should be able to deal adequately with routine legal problems in a short time. Since an American lawyer's fees are largely determined by the amount of time spent actually and notionally on a case, the time factor is very relevant. R. pointed out that he was liable to be accused of unprofessional conduct because in some cases he prefers to charge at less than the prescribed minimum rate. Being convinced in his own conscience (despite the Bar Association's views on professional ethics) he was almost welcoming a challenge to his allegedly unprofessional conduct. He feared, as did many of his compatriots, that professional ethics were becoming more and more concerned with the execution of the lawyer's job and less (if at all) with the client's interests. This informant was a rather conservative conventional man. There was no doubt that he had a very high ideal image of the lawyer's role in society and a low opinion of too many American lawyers. He tended to identify his own standards as 'old fashioned'. In a sense perhaps this is precisely what the standards of the Faculty of Advocates are. They have been so clearly safeguarded by excellent role-preserving devices in a setting and community where great control is possible.

There are many occasions on which the 'old fashioned' or traditional role of the advocate is reaffirmed in relation to the profession and the community as a whole. At the opening of the legal year, for example, there is a Kirking of the College of Justice, who by tradition are allocated special seats in the High Kirk of St. Giles. (There is a corresponding Red Mass for Roman Catholics). Those who attend these services observe strict rules of procedure, the Senators of the College of Justice, preceded by the maces taking precedence, followed

by the Faculty of Advocates, preceded by their Officers, in order of seniority of their patents as Q.C.'s or of admission to the Faculty. Bag wigs are on this occasion worn by judges and senior counsel. Then comes the W.S. Society (as an integral part of the College of Justice); thereafter other societies of solicitors in Scotland. When the High Court of Justiciary goes on circuit special hospitality is provided by the Town Councils, notably in Aberdeen - and the very junior advocates who often gain experience on such occasions are treated as important, if not very important, personalities. These symbolic re-assertions of the role are encountered on all great state occasions as on coronations of sovereigns and so on. They perpetuate a public image and create the opportunity for the whole Faculty to reassert its solidarity and show its privileged status in the community. The motto of the Faculty's cognizance is taken from Ulpian's¹⁸ famous ~~Three~~ principles of Justice, 'Jus suum cuique' (give to each his due). The other two principles are 'Honeste vivere' (live honourably) and 'Alterum non laedere' (do not harm your neighbour). In this particular setting the Faculty seems largely to approximate to these standards - and this fact is seen in their playing their part, not only as professional lawyers, but as men of high standing in a small community. They have been relatively only slightly exposed to the influences of great wealth or power which might have tended to corrupt, while their sense of privilege and tradition has safeguarded them from jealousy of those who (inside or outside the legal profession) have enjoyed these other determinants of human conduct. The Faculty is not an intellectual élite; it does not minimise the difficulty of legal techniques, nor, on the whole, pioneer law reform. Preservation of their mystery tends to preserve the lawyer's role. The proposals for law reform propounded by Lord Gardiner reputedly include making the law intelligible

18 Dig. 1, 1, 10, 1.

to the layman. The writer is informed (by lawyers) that this is quite impossible and herself believes that it would be an exceptionally difficult task. Nevertheless, the expected wide-ranging scrutiny of law and legal techniques may not be irrelevant in the context of role-preservation.

The psychologist Robinson¹⁹ has showed the matter as follows: "The lawyers are a priesthood with a prestige to maintain. they must have a set of doctrines that do not threaten to melt away with the advances of psychological and social science.... they must, in order to feel socially secure, believe and convince the outside world that they have peculiar techniques requiring long study to master. In a way they have overplayed this card. Even laymen are coming to see that if the Law were as difficult to understand as the profession implies, nobody would ever be able to become a lawyer."

19 E.S.Robinson, Law and Lawyers, p.28.

Chapter 10CONCLUSION

For the purposes of a social anthropologist the Faculty of Advocates can probably be regarded as a unique professional group. Its social solidarity has only been confirmed - not lessened - by possible threats to its economic security and established privileges. To a large extent even the cocktail and dinner parties given by members of Faculty may be seen as reaffirmations of the group, asserting in effect 'Here we are, a group of people holding the same values, obeying the same rules, fixed in the same system. Let us demonstrate our solidarity to one another.' Specialist roles in most groups have become more specific while basic roles of sex, age and race, which custom exaggerates to serve the ends of social organisation, become vaguer and less important as societies advance. This research has been concerned with a social system which has been developing for about four and a half centuries. A classification and differentiation of roles was desiderated to refract the various ways in which basic and specialised roles have responded to economic and social change. It was conjectured hypothetically at the outset of this enquiry that in the comparatively unchanging society in which the Faculty acts its roles, some typology of devices might be found of more general relevance

What in fact emerged when the evidence had been collected and analysed is that one 'device', if it may be so described, is of overwhelming importance, namely, the smallness of the group itself. The professional community, its role-set, the wider (yet limited) community in which members of the profession pursue family and leisure activities are all numerically small. Thus the members

of the community and of the 'community within a community' can be and are constantly observed by each other. Social density is high. Pressures of the outside world tend to promote role-conflict, but the advocate's community in large measure avoids this result by rejecting the world, its standards and general social and economic trends. There is no desire to be 'with it' or ahead of events, as seems to be the reaction, for example, of the high powered American corporation or trust lawyer. Such an attitude would be unacceptable by the norms of Parliament House.

Constant and mutual 'policing' of the group and its members by the members and by their close associates seems to be the overriding factor in the control of role-playing and in the apparent absence of role-contamination in the Faculty of Advocates. An American social anthropologist, parodying television advertising, remarked to the writer at an early stage in her research 'As far as I can see, the role of the advocate in Scotland is washed whiter than white.'

After long investigation, extending at different levels of intensity over twenty years, the writer has observed some grey patches and the bleaching process which they undergo. This process appears to be achieved in a way that Durkheim specifically indicates, and Malinowski by insight suggests; namely, through high social density and homogeneity of the group leading to social solidarity and social control beyond what is commonly achieved in the modern Western world. The Faculty is not interested in expansion, but in preservation and perpetuation of its 'organic mystery'. Collectively it does not question that conservation and pursuit of its own best interests and norms also tend to further the best interests of society in general. The institution functions admirably. Beyond what might have seemed possible before the data were closely studied, the Faculty has maintained its own ideal image, including

control of normative behaviour and role-performance, absence of role-conflict and of role-contamination. This ideal self-image is largely related to a world which through tradition the Faculty came to apprehend, and for which it was admirably suited. In the 'New Anatomy of Britain' this image is less relevant. Nevertheless, as with the elite and exclusive regiments of the armed forces and the Foreign Service, so with the Faculty of Advocates, traditional norms of exceptional integrity and service maintain their value in a social setting which in general does not reflect them. Noblesse oblige, and the Faculty which, though middle class, has inherited aristocratic traditions, does not by reason of its professional monopoly neglect the obligations which the Faculty construes to be incidental to privilege. The structure of the Faculty still remains essentially eighteenth century, as does the professional dress of advocates, and its legal techniques are largely the product of and appropriate to the century which followed.

Failure to react with realism and comprehension to the social, economic, scientific and international trends of the modern world seems to characterise the outlook and attitude of the Faculty of today. Its self-image and its popular image among those equally unaware of the significance of these trends do not correspond to the image presented to those, within the profession and outside it, who are capable of a wider view and of a more penetrating assessment. It has been observed already that those who hold high positions in mercantile and industrial life, and who are responsible for its national and international direction, do not regard the Faculty of Advocates authoritative or expert in those matters which concern industry, commerce, finance or the national economy generally. The days when Adam Smith could be quoted to the Scottish Courts to influence judicial decision on economic questions have no

modern counterpart. Though adequate grounding in economics, philosophy and political theory is required for practice in legal professions elsewhere in the world, even an amateur grasp cannot be assumed in the case of the modern Scottish advocate. No longer, as in Cockburn's time, could the advocates be regarded as the cultural elite of the Scottish capital. The accidie is apparent both in an attitude to the practice of law, and in a wider context, where it has resulted in a defensive attitude to inherited privileges and carrying out of roles.

So far as the practice of the law is concerned, there seems to be a marked unwillingness to experiment with new ideas or techniques which have been discussed or put into operation elsewhere. Thus the main Faculty reaction to the prospect of Britain entering the Common Market - which would have far ranging legal implications - was of indifference. No positive harm was anticipated: there was no immediate threat. There was no interest in the challenge of new economic and political legal facts. Except for a few essential technical legal treatises, the shelves of the average practising advocate are meagrely supplied with legal literature. The average advocate possesses few of the 'tools of his trade'. The Bar as the so called 'learned profession' might be expected to be willing purchasers at least of law books. This is no longer true, and accounts for the fact that Scottish legal literature is largely obsolete because of an inadequate market. In South Africa where the legal system is isolated and the profession limited in number, book selling flourishes. Few advocates in Scotland subscribe to or contribute to the learned journals. Most rely on the facilities of the Advocates' Library which closes at 4 o'clock in the afternoon or (if they live in the New Town) on the Juridical Library in

Charlotte Square. Now the Faculty is dependent on the Ministry of Works for a library building and on the statutory right of the National Library to receive gratuitously new books published in Britain for their legal literature. A recent endeavour to secure the use of the Advocates' Library until 7 p.m. on weekdays has been refused. Discouraged by certain judges, who are reluctant to consider citations from modern authors, the Bar itself seems hostile to and afraid of new ideas and to the presentation of basic principles in new or expanded contexts. Most advocates have been nurtured on one introductory text book 'Gloag and Henderson's Introduction to the Law of Scotland'. When this went out of print an attempt was made to replace it with a less condensed and dogmatic treatise. This new work, which discussed the law of Scotland critically and in relation to other legal systems, is virtually unused by the practising Bar, and very few have troubled to read it before rejecting it. In general the 'patching of old wine skins' - the issuing of revised editions of familiar treatises - is preferred to the production of new books.

Legislation has been introduced to set up 'Law Commissioners' in Scotland and England to modernise the law in harmony with current social and economic needs. There has been considerable hostility to the idea among Members of Faculty, and the initiative was entirely from the English side. When questions of law reform have been considered in Scotland, the evidence submitted by the Faculty of Advocates to the Law Reform Committee for Scotland or to special Committees or Commissions has almost invariably been conservative, and either apathetic or antipathetic to ideas of change.

Little encouragement is given in the Inner House to a deep and scholarly argument such as the late Lord President Cooper appreciated. To a large extent, of course, the cases which have to be argued today lack the intellectual

stimulus of earlier times. The general attitude is that the solution will be automatic when the relevant cases are cited as precedents. Seldom do counsel rely on authorities other than Scottish or English, and increasingly depend on the latter, since they are more numerous and more modern. Hence many characteristic and valuable principles of Scots law as a civilian system have come to be obscured and lost. The late Lord President Cooper, a man of wide interests as historian and engineer, observed that without attention to Comparative Law, the Law of Scotland must die. His warning has, on the whole, fallen on deaf ears. There is very little interest taken by most members of Faculty in any legal system but their own, and the facts that few foreign treatises are taken by the Advocates' Library and that few judges or advocates would have the linguistic skill to master them, increases the isolation of Scots law and its profession. Paradoxically a lack of interest in the ethos of Scots law as such is matched, as has been stressed already frequently, by the solidarity of the Faculty in maintaining its own prestige and privileges. Awareness of these matters accompanies a rather parochial satisfaction with the system as it is, and lack of interest in the world outside.

It would be in the best interests of litigants, notably in the matter of expense, were jury trial to be dispensed with in civil cases, most of which could also be dealt with in the Sheriff Court subject to the right of appeal to the Court of Session, and were divorce jurisdiction to be given to the Sheriff Court. Such alterations in jurisdiction would have grave financial repercussions on the Faculty and are resisted on account of the indirect challenge involved to the Faculty's survival as it is at present. The interests of the public are only mentioned in casuistic arguments to preserve the

status quo.

Further, the Faculty is consciously or unconsciously afraid of other professions which have emerged and may seem to challenge its own authority or prestige. Little use is made in Scotland as in France of experts participating in the process of decision, though expert witnesses are frequently examined and cross examined by counsel, who lack specialist knowledge, before judges or juries who are similarly handicapped. In the nineteenth century, there were relatively few professions, and that of advocate in Scotland was pre-eminent. The modern advocate seeks to cling to this inherited prestige, and is not anxious to yield part of it to the newer professions such as that of the accountant. For a longer time account has had to be taken of the opinions of medical experts. The more modern branches of medical science, such as psychiatry, are accorded little respect by lawyers especially in criminal proceedings. Though psychiatry is generally accepted as a perfectly reputable science, its practitioners will frequently be referred to disparagingly by the legal profession as 'trickcyclists' or 'head-shrinkers', and an impasse may result when the psychiatrist cannot explain his 'mystery' in terms of legal categories.

In conclusion, it must be suggested, not without considerable regret, that the methods and assumptions of social anthropologists in studying modern professions seem to have little relevance (if any) to an analysis of the Faculty of Advocates. More useful clues are provided by the older school of social anthropologists, who studied small groups in primitive societies. The smallness and high social density of the Faculty in a wider but yet restricted social setting and in a small country account for most of its characteristics. Its prestige and influence are largely due to historic factors and its recruitment

from a limited social class. Many of its leaders are socially 'anglicised', and even in exercise of professional techniques prefer English text books and decisions to working out Scottish legal principles. There is a certain cultural conflict involved in the situation that the 'in group' of the Faculty of Advocates is largely identified with the London orientated 'establishment' which regards Scottish institutions and cultural values as parochial. Almost by accident the Faculty, as part of the College of Justice, has been protected by the Union Agreement of 1707, which safeguarded the Scottish legal system independent from that of England which in most other matters has tended to engulf Scottish life. Yet the insularity which has been characteristic of the English legal profession in the past, at a time when that of Scotland was cosmopolitan and orientated towards Europe, is now a characteristic of the Faculty of Advocates. Now parochial and privileged it is content with, but also defensive about, its image. It is parochial, not only with regard to legal ideas and techniques, but also with regard to natural science, social science - including economics, sociology and politics - and to general culture.

To some extent in enjoyment of monopolistic privileges the Faculty corresponds to the state, in the eighteenth and early nineteenth centuries, of the Scottish Universities which had too often failed to adapt themselves to a changing world, though, as Dr Davie has demonstrated, they were more successful than Oxford and Cambridge at the same period. (Radical reforms were made after a number of Royal Commissions had reported, though many University teachers especially those from England consider the present Scottish University structure still to be anachronistic.) Another general comparison could be made with the social density and exclusiveness in the eighteenth and early

nineteenth centuries of the Scottish Burghs, the rights and privileges of which had been protected by Article XXI of the Union Agreement. Of these Professor G.S. Pryde has written,¹ 'The town councils of the royal burghs were self-perpetuating bodies, answerable to no one but themselves and forming a close oligarchy, while burgess-ship itself was kept within narrow limits by the raising of charges exacted from guild brethren, craftsmen and burgesses.' In short, in the eighteenth century Scotland there were a number of exclusive, privileged groups, and of these the Faculty of Advocates is virtually the sole survivor. Its positive contribution to the cultural life of the community in the past and the activity of its Whig members in furthering reform in the early nineteenth century (but not of the Faculty itself), no doubt safeguarded it in an earlier era of radical reform.

It may be that the Faculty is approaching the end of an epoch, unless it can adapt itself more to the modern world, reject the devices which ensure monopoly, and create a new image of itself. Much of its traditional professional ethics deserves preservation in a new setting if this is possible. So long as the solidarity of the group is maintained, including the solidarity of those appointed Law Officers of the Crown, direct attack on the institution by legislation or Government pressure would encounter formidable obstacles. Any such attack, moreover, would affront the sentiments of many Scotsmen, of the middle classes at all events, who have a favourable image of the Faculty, fostered by the Faculty, as the repository of a unique and indispensable national tradition. High social density has determined role-control and social solidarity. It has also operated to preserve the group. Should this solidarity relax, dissolution of the group would seem imminent. External trends and forces are not propitious to its survival. The ultimate challenge to the Faculty is not

1. A New History of Scotland, ii, p.189.

the direct impact of social forces to which it refuses to adapt, but a challenge to its solidarity by diluting the elements of homogeneity and tradition. This could happen in three ways. First, there might be fusion of the legal profession in Scotland. Secondly, there might be the infusion of an 'alien' element. As long ago as 1831 Lord Cockburn spoke scathingly and resentfully² of Brougham's project to give English counsel the right of audience in the Scottish courts: he did not pause to explain the potential jeopardy for a 'protected' profession. Thirdly, entry to the Common Market or some such European integration would involve acceptance of professional mobility among the participating states,³ and therefore an even wider possibility of saturation by those who have not been conditioned by the norms of the Faculty. It is only an apparent paradox that these challenges are stated in ascending order of probability. The Faculty is so structured as to contend in the strength of its own solidarity and complacency against the nearer and more obvious threats. Therefore to convey a viaticum would be premature. Unique in so many other ways, the Faculty of Advocates is also unique in its viability as a very small homogeneous group in a social context for which it was not devised and to which it is reluctant to adapt.

The interesting features of this conservative unchanging profession are perhaps less easy to assess sociologically than they are historically. It seems clear that the function, the role and the normative behaviour is of high integrity, and the nature of the group in which the advocate lives and works is such that a great deal of informal social control is exercised. There is no real evidence of role-contamination and no real pattern of role-conflict. There

2. Journal ,i p.3. Brougham, who had 'passed advocate', was one of the few Englishmen to have practised at the Scottish Bar.

3. See p.10 supra

are deviants within the group; the fact that their names frequently occurred in examples of role-breaking or of role-contamination was the first sign the writer had that deviance rather than a structured pattern of role-breaking existed. The role of advocate may be outdated. Advocates themselves may be less a 'learned profession' than they would like to believe. The specific nature of their role and its preservation through training and through the customary and close observation and control of their small society is a prevailing fact. It would indeed be easier to compare them with the Barotse than with the Americans.

This institution has acquired no new functions. The scale of its operations has diminished rather than increased in recent years, its values have remained the same and there has been no dilution of them. The 'business' of the advocate has undergone no radical change, there is no competition, the monopoly persists. If society as a whole is the loser no one appears to be noticing unduly. The criticisms of 'the lawyer' remain basically as they have always been. Dean Swift suggested in their heyday that the Bar was 'a society of men bred up in the art of proving that black is white and white is black, according as they are paid'.⁴ Bentham declared that 'the duty of an advocate is to take fees, and in return for these fees to display to the utmost advantage whatsoever falsehoods the solicitor has put into his brief'.⁵ Even Boswell felt compelled to ask Dr. Johnson 'whether, as a moralist he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty'.⁶ The public image is most of the time as it has always been. The ideal image is equally unchanged. The art of the advocate is modelled on the systems of Cicero or Quintillian for whom 'the true orator must be, above all, a good man';⁷ his task to protect the foremost of our civil liberties - 'The

4. Quoted from Leo. Page 'First Steps in Advocacy' (1945) p. 15

5. Jeremy Bentham, 'Packing' (1821) p. 48

6. Life of Johnson (revised Birkbeck Hill Ed. 1934) Vol. II p. 47

7. Quintillian Institutes II xvi. 11

open administration of justice according to known laws truly interpreted and fair constructions of evidence'.⁸ To quote Sir Randall again.⁹ 'I take pride that, in Scotland, some of our firmest champions of truth, honour, and liberty have been trained in the law' - men like the draftsman of the famous Declaration of Arbroath in 1320, who put his own soul into these words which he borrowed from Sallust.¹⁰ 'For we fight not for glory nor riches nor honours, but only for that liberty which no true man relinquishes but with his life'. The ideal is unchanged. The real image of the Scottish advocate is perhaps less noble than this expression of the fourteenth century which in fact preceded by more than two centuries the establishment of the Faculty. If their role in the legal system were to be examined in the 1960s it might be found to be less necessary than is supposed. And yet, were they to disappear society itself would be the loser.

8. Hallam, Constitutional History, Vol. 1 p. 231

9. James Randall Philip. op. cit supra at p. 2.

10. Sallust. Bellum Catalinae, xxxiii.

APPENDIX A¹

(Extracted from T.B. Smith, British Justice: The Scottish Contribution).

CIVIL COURTSCourt of Session

By the early nineteenth century the need to improve the organisation and procedure of the Scottish courts was generally accepted; but the proposals for reform suggested by a succession of Select Committees and Royal Commissions, disclose little agreement as to the most expedient solutions. Empiricism and at times prejudice determined the course of certain earlier legislative changes, while others have proved wise and far-sighted.

Reorganisation of the Court of Session

First, we may note that the Court of Session, for the conduct of normal business, lost its unitary character. After various experiments the organisation (which still operates) was adopted of dividing the court into an Inner House of two permanent chambers or Divisions, and an Outer House in which the eight junior judges sit singly as Permanent Lords Ordinary - judges of first instance. The First Division of the Inner House is presided over by the Lord President, and in the Chair of the Second Division is the Lord Justice-Clerk. Unlike the system of judicial promotion in England, a Lord Ordinary is promoted to the Inner House according to seniority of appointment, while vacancies in the offices of Lord President and Lord Justice-Clerk are usually filled by former law officers. Each Division (comprising four judges, but with a quorum of three) exercises both an original and an appellate

1. See p. 102 supra.

jurisdiction, though its work is mainly appellate. The appellate jurisdiction of the Divisions comprises appeals from the Lords Ordinary and from the Sheriff Courts.

The original unitary character of the Court of Session has, however, survived for certain important purposes. Questions of special difficulty or importance may be argued before five judges or seven judges or before the whole court. Moreover, a Lord Ordinary may report a case of difficulty, without deciding it himself, in order to have an authoritative ruling. Though strictly a decision by one Division may not be a binding precedent except for single judges, in fact choice between conflicting precedents, or the over-ruling of an unsound precedent, is usually achieved by convening a court of seven judges - or if necessary, all sixteen - who could overrule any precedent other than that of the House of Lords. This is a very convenient device, and results from the theory that in a collegiate court the majority of judges cannot be bound by a minority, regarding law or fact. The converse solution has been reached by the Court of Appeal in England.

Consolidation of the Central Courts

The next development to be noted is the merging during the nineteenth century of other central civil courts - over which there had previously been appellate jurisdiction - into the Court of Session itself. There was, of course, no question as in England of need to fuse law and equity - since these had never been separated in Scottish practice. (Lord Eldon, in the era described in Bleak House, concluded - sombre thought - that until a division between law and equity had been achieved in Scotland, the House of Lords could not deal properly with Scottish appeals. Fortunately, on this point at least he was restrained). The Court of Session by a succession of reorganising statutes absorbed the higher Commissary Court, the civil jurisdiction of the Admiralty Court, the Court of Exchequer and the Jury

Court - this last, itself a creature of the nineteenth century. In 1836 the Commissary Court was suppressed; and so thereafter consistorial matters such as marriage and divorce and also most questions of status generally have been within the exclusive jurisdiction of the Court of Session - though the Sheriffs have concurrent jurisdiction regarding judicial separation and custody of children. The Scottish Court of Admiralty - administering a law in which Scotsmen had given the lead to Britain - succumbed to the jealousy of three rivals. In 1825 by a particularly offensive example of the tendency of certain influential interests to regard the English courts as imperial and the Scottish as local and limited, jurisdiction in prize was taken from the Scottish court, and vested solely in the High Court of Admiralty of England. In 1827 the civil and criminal jurisdiction of the Scottish Admiralty Court was distributed between the Court of Session, the High Court of Justiciary and the Sheriffs. The Scottish Court of Exchequer set up after the Union to deal with revenue questions was absorbed into the Court of Session in 1856, but Exchequer jurisdiction is still subject to certain specialties due to the English origin of many matters which concern it.

The Legal Profession

A point which would surprise the American and English observer in Scotland is the lack of specialisation on the Bench and at the Bar. Though some counsel are particularly sought after in certain types of case, none can specialise in one field exclusively. This has merits and disadvantages. (One advantage is that a judge on appointment has wide general experience, while among the disadvantages may be counted the fact that in very technical branches of law such as patent law, Scotland cannot produce a Stafford Cripps. The leading experts in fields such as company law, taxation and financial trusts may be found among specialists in firms of solicitors). For the very great majority of entrants to the legal profession, advocates and

and solicitors, the professional qualification is a university degree in law - which facilitates transfer from one branch to the other, if, for example, a solicitor wishes eventually to specialise in advocacy. Moreover, there is no atmosphere of stratification between the two branches. Members of the Faculty of Advocates alone (the Scottish Bar) have right of audience in the superior courts, but solicitors may plead in the Sheriff Courts which have very considerable jurisdiction. Advocates who practise in the Parliament House have an address in the New Town of Edinburgh and may not combine in partnership. Solicitors, on the other hand, normally practise in partnership. Recruitment for the practice of law in Scotland is democratic; but, particularly since the Union, those who maintain the legal heritage of Scotland - especially in the Parliament House - have become a professional aristocracy by function.

The Sheriff Court

I must stress in particular the importance of the Sheriff Court in Scotland today - and contrast the role of the Sheriff with the very different arrangements made in England for the administration of justice outside the Supreme Courts. After the abolition of the hereditary sheriffdoms in March, 1748, the Sheriffs Depute were paid from public funds. These Deputes were advocates practising in Edinburgh, but were required to reside in their sheriffdoms for four months in the year - a duty which they frequently shirked when in conflict with the claims of practice in the courts. They were authorised to appoint substitutes to act in their absence (whose salaries after 1787 were paid by the Crown). These substitutes might be men with no adequate legal experience, and therefore any matter of consequence was reported to the Sheriff Depute for decision. Thus Walter Scott as Sheriff Depute of Selkirk handled much more judicial work himself than most writers have realised.² In 1838

2. J. Aikman Smith, "The Great Shirra", The Scotsman; Jan. 12, 1959.

Sheriffs Depute (other than those appointed to Edinburgh and Glasgow, which are full-time appointments) were released from the duty of residence in their sheriffdoms, while a series of statutes increased greatly the status of, and qualifications required of, Sheriffs Substitute. They were required to be advocates or solicitors of at least five years' standing; they were appointed and remunerated by the Crown, and thus became the territorial judges of Scotland. No titular Sheriffs can now be appointed. (The Sheriffs Depute, now generally known as Sheriffs Principal, are thus today not in fact depute to anyone, while the designation Sheriffs Substitute is equally misleading, since they are not in fact substitutes for anyone). Both categories are addressed on the Bench as "My Lord" and off the Bench as "Sheriff".

Though in civil causes an appeal lies from the interlocutor of a Sheriff Substitute to the Sheriff Principal, it is equally competent for a litigant to appeal direct to the Court of Session. The original jurisdiction of Sheriffs Principal and Substitute is the same. By amalgamations of the less populous counties the number of sheriffdoms has been reduced to twelve. To each a Sheriff Principal, a senior member of the Faculty of Advocates, is appointed, while one or more Substitutes reside in each sheriffdom, and administer justice in the principal towns. There are about fifty such judges. As a court of original jurisdiction in civil causes the Sheriff Court has, in general, concurrent jurisdiction (without monetary limitation) with the Outer House of the Court of Session. A Sheriff can grant interdict or decree specific implement; he can deal with judicial separation, custody and aliment. Other actions involving status, however, such as declarator of marriage, divorce and bastardy are reserved to the Court of Session, as are actions for setting up or setting aside documents and certain company matters.

CRIMINAL COURTSHigh Court of Justiciary

While I think that criminal justice in Scotland is very fairly and efficiently administered today, the system is not necessarily suitable for export. Much depends on certain conventions which have developed within the Crown Office and by the etiquette of a small profession. Let us, however, just look very briefly at the organisation of courts of criminal jurisdiction in Scotland today. The High Court of Justiciary is Scotland's supreme criminal court, exercising both original and appellate jurisdiction. Since 1887 all Senators of the College of Justice - that is sixteen judges - are by virtue of their appointments also Lords Commissioners of Justiciary. They may sit in Edinburgh or go on circuit to the various towns in Scotland to try the gravest crimes. (There are four circuits, North, West, South, and Home). As a rule one judge only sits at the trial of an accused, but in complicated cases two or even three judges may sit. Moreover, if some question of exceptional difficulty emerges at a trial, the presiding judge may certify the case for the opinion of the whole court. Fundamentally the court is a collegiate body. Any matter involving the nobile officium or "criminal equity" of the High Court must be dealt with by a Bench of judges, and not by one alone. If the traditional power remains to declare a new crime sui generis, or to consider the legal validity of a doubtful defence, such power can only be exercised in this way. Thus in Sugden³ the whole court sat to determine whether the rule of Roman law, that crimes could not be prosecuted after twenty years from the date of wrongdoing, was part of the law of Scotland. In Kirkwood⁴ sentencing policy in dealing with cases of diminished responsibility was considered by all the judges.

Though the High Court has always exercised control over criminal proceedings

3. 1934 J.C. 103.

4. 1939 J.C. 36.

in the lower courts, it was not until the Criminal Appeal (Scotland) Act 1926, came into force that there was jurisdiction to hear appeals from conviction and/or sentence after trial on indictment. In fact, Oscar Slater, who in 1909 had been found guilty of murder, had his conviction quashed in 1928 after completing a life sentence.⁵ It is largely as a result of this appellate jurisdiction that the criminal law of Scotland is developed in modern times, since the opinions of single judges do not bind their brethren. Decision between conflicting precedents pronounced by quorums may be achieved by convening a Full Bench - usually of five or seven judges. It is a moot point whether the whole Court could repudiate an earlier precedent by the Whole Court - but ^{it} is probably entitled so to do.⁶

Sheriff Court (Criminal) and Inferior Courts

The Sheriff has long exercised a very wide criminal jurisdiction indeed, though he may not try certain crimes such as murder, attempt to murder, rape or incest. His powers of punishment are, however, limited. If he is exercising solemn jurisdiction - when the accused is tried by a jury of 15 - after conviction the Sheriff himself can generally impose no heavier punishment than two years' imprisonment. On the other hand, he may remit the accused to the High Court for sentence; and this procedure is frequently adopted these days to secure speedy trial. If the Sheriff is exercising summary jurisdiction he sits alone, and, unless statute has prescribed a heavier penalty, cannot normally impose a sentence of more than three months' imprisonment. His decision may be appealed by way of stated case.

5. Slater, 1928 J.C. 94

6. T.B. Smith, Doctrines of Judicial Precedent in Scots Law. p.30

The Sheriff's criminal jurisdiction is universal, subject to certain crimes being reserved to the High Court. Other inferior courts, however, only have such jurisdictions as is conferred on them by statute or necessary implication. Moreover, the Sheriff has concurrent jurisdiction with every other court within his sheriffdom.

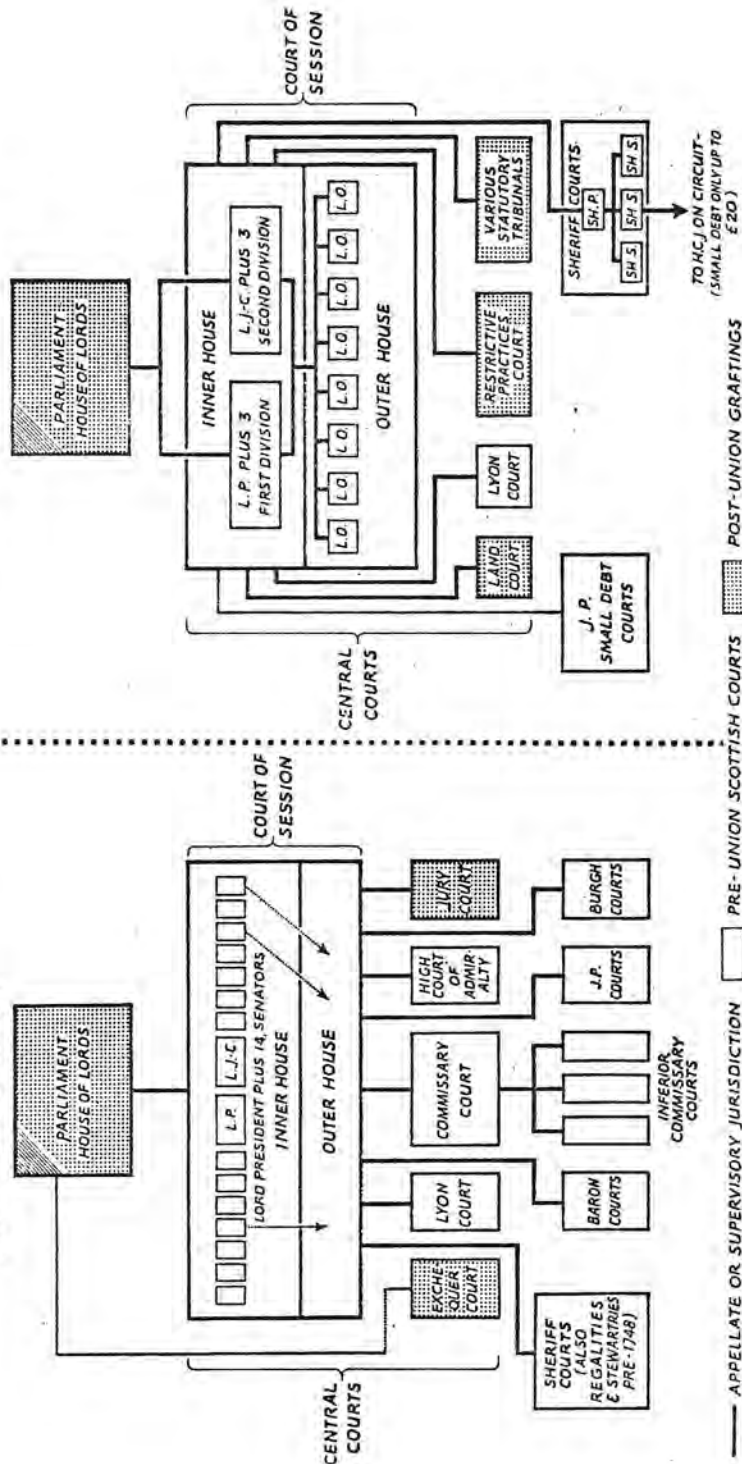
Reproduced with permission from T.B. Smith

SHORT COMMENTARY ON THE LAW OF SCOTLAND p.86.

CIVIL COURTS

BEFORE REORGANISATION
(15th - 19th CENTURY)

MODERN ORGANISATION



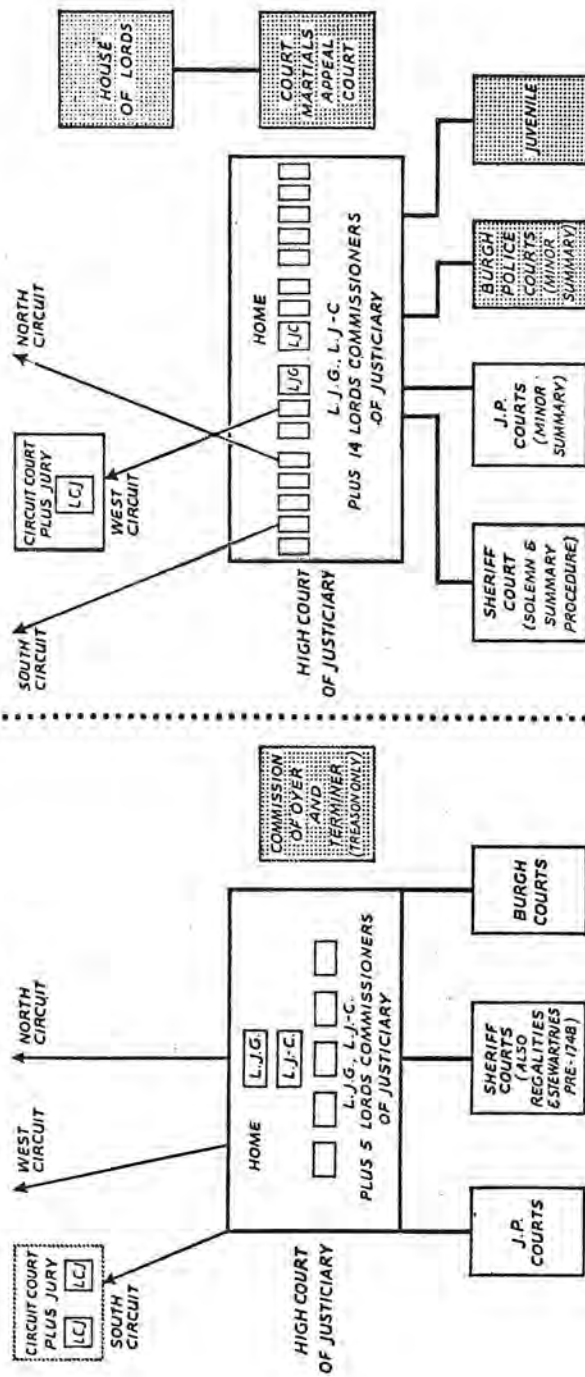
Reproduced with permission from T.B. Smith

SHORT COMMENTARY ON THE LAW OF SCOTLAND p.100.

CRIMINAL COURTS

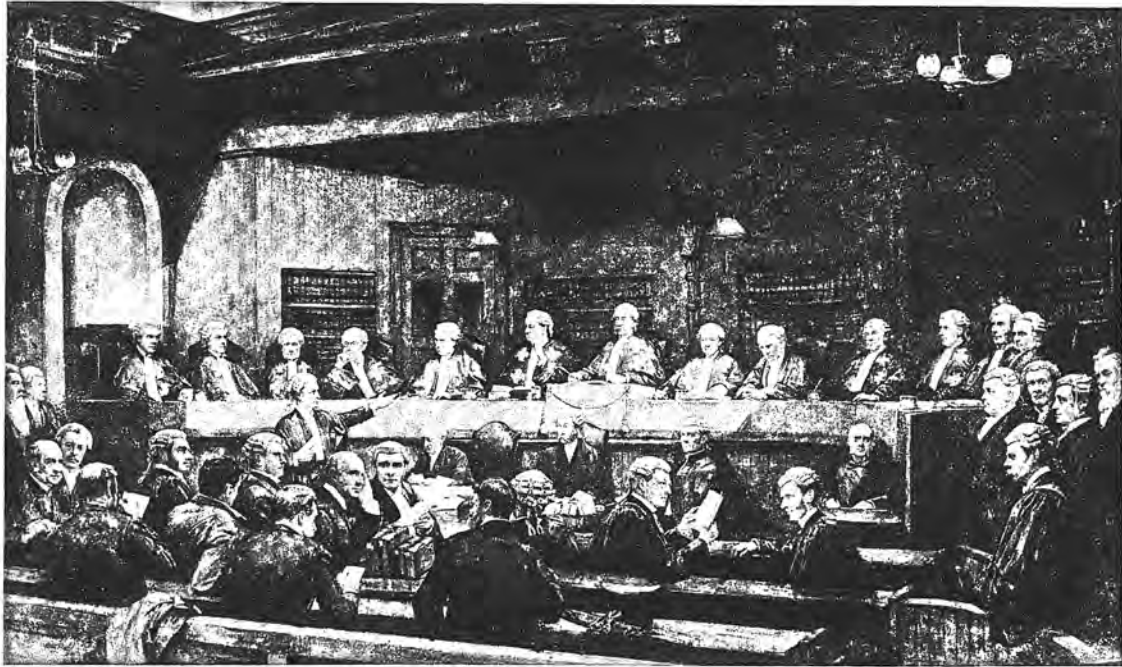
BEFORE REORGANISATION
(17th - 19th CENTURY)

MODERN ORGANISATION



APPENDIX B

The painting of the Scottish Bench and Bar in 1890 by W. Skeoch Cumming belongs to the Faculty of Advocates and hangs in Parliament House. A reproduction is included in the present thesis to illustrate some of the points made in the text. The Lord President has the Lord Justice-Clerk Macdonald (Lord Kingsburgh) on his right and the other judges sit alternately left and right in order of seniority of appointment. A 'Whole Court' of the High Court of Justiciary would have the same judges in criminal scarlet robes. At the time when Lord President Inglis presided there was no roll of Queen's Counsel; though this honour (as appears from the picture) was granted to the Lord Advocate, Solicitor General and Dean of Faculty. In this illustration thirteen judges make up the 'Whole Court': today the number is sixteen. It will be observed that the Lord Advocate (addressing the Court) sits within the Bar and across the table from him sits the Solicitor General with the Principal Clerk of Session immediately below the Lord President. Other Advocates sit (unlike the English practice) on Counsel's bench, with the Dean of Faculty in the middle of the Bar. Though the style of white tie has altered with the change in men's formal neckwear generally, the formalised dress worn by Advocates in 1890 is as today, and the different dress of 'silks' and those who have not been granted this rank and dignity can be seen in the picture.



THE SCOTTISH BENCH AND BAR 1890

APPENDIX CAN EXCURSUS ON SOCIETY, LAW AND MORALITY

The upholding and enforcement of morality or of a morality in Western Europe has been undertaken in past centuries by the law and by the Church with a certain overlapping of function. Indeed it has been noted that in most societies law and religion have often been closely linked; religious sanctions frequently being used to enforce social control. Sir Henry Maine, though he did not present a religious theory of law in general (as is sometimes supposed) did, under the rubric 'Wrongs and Sins',¹ point out the clear interaction of law and religion in primitive societies. 'Torts then are copiously enlarged upon in primitive jurisprudence. It must be added that Sins are known to it also ... non-Christian bodies of archaic law entail penal consequences on certain classes of acts and on certain classes of omissions, as being violations of divine jurisprudence and commands ... The conception of offence against God produced the first class of ordinances (those punishing sins); the conception of offence against one's neighbour produced the second (those punishing torts)'. In countries such as Switzerland, Holland and Scotland which adopted a Calvinist theocracy at the Reformation, the citizen was in effect subjected to two systems of jurisdiction - one lay, the other ecclesiastical. With the decline of ecclesiastical authority in Britain there have been indications recently that the law may be stretched to enforce a morality which formerly primarily concerned the Church. The relationship between law, the Church and morality is a matter of controversy among lawyers, theologians and social anthropologists.

1. Ancient Law. p. 393

In Western Europe the association between Church and Law has been very close - much more so than in Eastern Europe. From the Fathers of the Church to modern times the Roman Catholic Church has used terminology and concepts taken from jurisprudence. These include trial, judgment, condemnation, punishment and retribution. After the fall of the Western Roman Empire, the Church did much to preserve the Roman law. Indeed, in the Barbarian kingdoms where justice was administered, not nationally but on the basis of personal status, the Church as an institution continued to live under the Roman law, and gradually built up a legal system of its own, the Canon law, which was largely a moralised version of Roman law. Not only was the law of the Church concerned with the internal forum - matters of sin and conscience - but in mediaeval Europe she claimed jurisdiction generally over certain civil matters and also imposed sanctions on certain conduct such as incest, bigamy, sodomy, adultery, fornication, blasphemy, heresy and usury, which are now dealt with or tolerated by the civil power. In Scotland where a permanent centralised judiciary evolved late, church lawyers played an important part up to the Reformation. As T.B. Smith has put it in his Studies Critical and Comparative² 'Unlike the position in England very considerable jurisdiction was conceded in Scotland to the ecclesiastical courts before the Reformation and their successors the Commissaries up to the nineteenth century.' Moreover, a criminal indictment might formerly be laid in Scotland on the grounds that conduct offended against the Canon law. In Smith's book and in other writing he has traced the influence of leading churchmen on Scottish legal institutions. Not unnaturally Catholic concepts of morality permeated the administration of justice in local and central courts, though ecclesiastical lawyers were bitterly satirised by men such as Robert Henryson in his fifteenth century Fable of the Wolf and the Lamb,³ on charges

2. pp. 36-7

3. Cosmo Innes Scotch Legal Antiquities - Appendix

of avarice, oppression and venality.

In pre-Reformation times the law in Scotland was on the whole content to leave the disciplining of morals to the Church and to the confessional in cases where the lapse from the accepted code caused no great harm to others. This did not satisfy the Reformers. By legislation they struck at gambling, drinking, fornication, sloth and adultery in particular. Savage penalties, directed against those who could not or would not find work, authorised what was in effect forced serfdom on a large section of the Scottish people.⁴ 'Notour' i.e. manifest adultery became a capital crime. Though divorce for adultery was allowed by the Reformers, this remedy was envisaged as a punishment for crime, and, lest love might be fulfilled in consequence, it was specifically enacted in 1592 (and only expressly repealed in 1964) that all marriages between divorced persons and their declared paramours should be unlawful and that their children should be excluded from all rights in succession. The Reformers' morality however was less sensitive in the economic field. Where the Church of Rome had forbidden usury,⁵ Scots law after the Reformation permitted not only interest but also penal stipulations to compel performance of obligations. It is unnecessary to develop the implications regarding religion and the rise of capitalism drawn by writers such as Weber and Tawney, and it may be permissible to quote the late Lord President Cooper:⁶ 'There is no legal system of the period which had to devote so much attention for so long a time to the frustration of chicanery as Scots law had to do in the sixteenth and seventeenth centuries, and I wish John Knox had told us why.' Though the theme of Weber's study The Protestant Ethic and the Spirit of Capitalism⁷ is

4. T.B. Smith 'Master and Servant' in Introduction to Scottish Legal History (Stair Soc. Vol. 20)

5. For discussion see Stephens History of English Criminal Law iii esp. pp. 194, 197-8 'for a considerable time usury was regarded all over Europe as an inferior pursuit. This view was attacked at the Reformation'. Usury was an ecclesiastical offence. See also Smith Short Commentary on the Laws of Scotland pp. 857-8.

6. Selected Papers pp. 288-9

7. Max Weber The Protestant Ethic and the Spirit of Capitalism (trans. Talcott Parsons p. 37)

well-known, the following quotation may be less so: 'The rule of Calvinism .. as it was enforced in the sixteenth century in Geneva and in Scotland, at the turn of the sixteenth and seventeenth centuries, in large parts of the Netherlands, in the seventeenth century in New England, and for a time in England itself, would be for us the most absolutely unbearable form of ecclesiastical control of the individual which could possibly exist. That was exactly what large numbers of the old commercial aristocracy of those times in Geneva as well as in Holland and England, felt about it. And what the reformers complained of in those areas of high economic-development was not too much supervision of life on the part of the Church, but too little. Now how does it happen that at that time those countries which were most advanced economically, and within them the rising bourgeois middle classes, not only failed to resist this unexampled tyranny of Puritanism, but even developed a heroism in its defence? For bourgeois classes have seldom before and never since displayed heroism. It was 'The last of our heroism' as Carlyle, not without reason, has said.'

Though much private morality came directly within the province of the criminal courts, under Calvinist theocracy the Kirk session and other legally recognised church courts also exercised sanctions which in a rural society may well have been more oppressive and humiliating than the pains of the law. This more diffuse social control exercised by means of such sanctions as ostracism, ridicule and gossip have powerful effect in all social systems. It is evident from the mission of Jeanie Deans to save her sister Effie, described in Scott's The Heart of Midlothian, that it is the saving of 'an honest house from dishonour', the knowledge of the social shame more than the fear that Effie may be hanged, that spurs Jeanie on Effie's behalf. This public shame of the 'cuttystool' or of 'standing in the Kirk' was a strong sanction in Calvinist Scotland. (The sanction

survived in the North of Scotland within the experience of middle-aged people). The consequence of an attempt to 'brazen out' the punishment can be found in Calt's Annals of the Parish⁸ where Nichol Snipe 'a graceless reprobate' being 'obligated to stand in the Kirk ... came with two coats, one buttoned behind him and another buttoned before him, and two wigs of my lord's (his master's)... the one over his face, and the other the right way -; and he stood with his face to the church wall. When I saw him from the pulpit, I said to him, "Nichol, you must turn your face towards me!" At which he turned round, to be sure, but there he presented the same show as his back... I... cried out with a voice of anger, "Nichol, Nichol! If ye had been a' back ye wouldna hae been here this day" - which had such an effect on the whole congregation that the poor fellow suffered afterwards more derision than if I had rebuked him in the manner prescribed by the Session.' The described sequel to the minister's devastating rebuke has particular significance.

The evil alliance between church and state in the persecution of witchcraft was largely concerned with sexual matters as well as with fear. Though this persecution was in effect initiated by the Holy Inquisition, its full horror was only realised in the Calvinist countries of Scotland, Switzerland, and Holland, and under the English puritans on both sides of the Atlantic, where of course the law was also used as an engine to enforce morality in private life. The writer heard of at least one woman who was sentenced to prison in the State of Massachusetts for adultery in 1962. Though the witch hunts of the twentieth century have a political drive, recent events have shown that sexual morality may well be invoked to set on the pursuit.

8. Blackwood Ed.i, p. 42-3

The doctrine of desuetude of Statute Law, changes in social attitudes and the reduced authority of the Church - reduced not only in severity but also and particularly in the numbers who accept it - have eroded much of the old puritan legislation in Scotland. On the other hand, most of the Scottish Bench and many of the leaders of the Bar from which it is recruited are devout and faithful churchmen and accept the traditional morality. It may be questioned how far the law is prepared to go in enforcing that morality when the authority of the Churches has declined. In considering this question it may be useful to take also into account the approach of English lawyers to comparable problems, in particular because the current trend in England seems to be that the judges favour and the jurists reject the right to use the law to enforce a particular morality in matters where harm is not occasioned to others.

First, it may be stated as obvious that any given society has its morality and an interest to ensure that members of that society shall conform to it. Various sanctions are available, ranging from legal processes to public disapproval or ridicule. Next, though in a modern Western State much law is regulatory in character, the core of the criminal law is concerned with harmful acts which are morally repugnant to the society. Thus morality has taken a great part in shaping the criminal law. This is not to say, however, that their spheres necessarily do or should coincide. They do overlap.

To what extent are the judges in Scotland free to increase the overlap? In the past the High Court of Justiciary has claimed an inherent power to declare new crimes if the act alleged was in their opinion grossly immoral and mischievous; and the leading treatise, Hume's Commentaries on the Law of Scotland in Matters

Criminal⁹ published in the early nineteenth Century clearly supports that view. However, by 1835¹⁰ Lord Cockburn, dissenting, expressed the view in a case concerning a gaming house, that, though the courts could punish new methods of committing recognised crimes, extension of the categories of crimes were the province of Parliament. This is the view which in the opinion of T.B. Smith at least has tended to prevail, though in his Short Commentary on the Law of Scotland he deals with the issue in somewhat Delphic fashion.¹¹ It is not for the present writer to assess what the law is, but she may record what the lawyers suggest it is. Lord Walker has stressed¹² the importance of the declaratory power in developing the law, and Mr. W.A. Elliott Q.C. notes¹³ that it has never been expressly renounced. Professor Smith, who is not notoriously conservative or orthodox in his opinions, concludes¹⁴ 'While there is no obvious objection to defining certain crimes today according to broad principles, some categorising is necessary and it may be observed that Hume's wide language states why certain acts were treated as crimes and does not provide a definition of criminal conduct. Clearly not all lying, extra-marital sexual activity or hostility to the Christian ethics which affects third parties could or should be accounted criminal today.' Moreover, he adopts the view of Turpin¹⁵ that without the principle of legality we should have what Donnedieu de Vabres calls a 'justice de circonstance abandonnée à l'influence des passions individuelles'. He names a case in 1934¹⁶ where the views of Hume were quoted in convicting for

-
9. i, p. 12
 10. Greenhuff (1838) 2 Swin. 236
 11. pp. 124, 131
 12. 'The Growth of the Criminal Law' (1958) Jur. Rev. 230
 13. Nulla Boena Sine Lege (1956) Jur. Rev. 22
 14. op. cit. p. 28
 15. (1961) Camb. L. J. 146.
 16. McLauchlan v. Boyd 1934 J.C. 19

lewd and libidinous conduct of a kind which had never been prosecuted before. Lord Justice-Clerk Aitchison, however, refused in 1937 to extend the criminal law to punish the supplying of abortifacient drugs to a woman who, contrary to the belief of the accused, was not pregnant. He observed¹⁷ 'It may be reprehensible conduct, it may be injurious to private and public morality, it may be conduct which ought to be criminal conduct, but that will not make it a crime by the law of Scotland.' Smith has also drawn attention to the very wide construction given recently to the offence of breach of the peace in certain cases involving indecency, but concludes that the limit has been reached. Rightly or wrongly, he suggests that the Scottish criminal courts will not assume the power to punish infringements of the traditional social morality of Scotland beyond the limits already established. Certainly in Scotland the Lord Advocate refused to prosecute or to concur in a private prosecution of the publisher of Lady Chatterley's Lover¹⁸ and it was a Scottish judge alone who dissented in the now celebrated Ladies' Directory Case, when it was appealed from the English Court of Criminal Appeal to the House of Lords. In Shaw v. the D.P.P., Lord Reid stressed¹⁹ 'Notoriously there are wide difference of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Parliament is the proper place and I am firmly of the opinion the only proper place to settle that. When there is sufficient support from public opinion Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts to rush in.'

English judges seem to have taken a very different view and in Shaw's Case in particular to have assumed the role of custodians of morality generally

17. 1937 J.C. 41 at pp. 45-6

18. McBain v. Crichton 1961 J.C. 25. The Lord Advocate had directed that no action should be taken in respect of this book except by prosecutors under his control. No such direction was given in the case of 'Fanny Hill', and a successful prosecution was brought in a burgh court - 'Scotsman' Oct. 23rd 1964

19. Shaw v. D.P.P. (1962) A.C. 220 at p. 275

by exercising the sanctions of the criminal law. Above all, they seem concerned with the traditional pattern of sexual morality in personal relationships and in published matter. Within recent years it has been held in England, that though the purposes of the Street Offences Act was presumably to remove the nuisance of prostitution from the streets of London, women who from their rooms attracted the attention of men in the street were committing an offence. Again it has been held that if a woman supplies for a consideration sexual gratification short of intercourse, this constitutes prostitution; and the cateteries could be extended further. However, the main issues centre round two cases - the prosecution which failed of the publishers of Lady Chatterley's Lover under the Obscene Publications Act 1961,²⁰ and Shaw v. D.P.P.²¹. In his Reith Lecture in 1961 Censors, Lord Radcliffe concluded that the dangers confronting freedom of expression in literature and art generally lay in the future in the anonymous censors who controlled the mass media rather than in officialdom. He raised the question as to whether the law which punishes obscene publications is to go the same way in the twentieth century as the law governing seditious and blasphemous libel went in the preceding century.

On the other hand, Professor H.L.A. Hart of Oxford, in his recent book Law, Liberty and Morality, has taken a less optimistic view of legal censorship. Indeed, he suggests that by invoking the peculiarly English doctrine of conspiracy the emancipating provisions of the Obscene Publications Act could have been evaded and conviction of the publishers of Lawrence's works secured. Hart is no narrow legalist. He recognises that law exists for society and not society for law. He recognises the relevance in the context of law and morality both of anthropology and psychology. For instance he notes²² 'If in our own day

20. See Penguin ed. of this trial.

21. sup. cit.

22. p.68.

the overwhelming moral majority has become divided or hesitant over many issues of sexual morality, the main catalysts have been matters to which the free discussion of sexual morals in the light of discoveries of anthropology and psychology have drawn attention.' To the question; 'Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law?' 'Is it morally permissible to enforce morality as such?' 'Ought immorality as such to be a crime?' He answers in effect 'no' - rebutting the contrary opinions of Sir James Fitz-James Stephens and Lord Devlin and attacking the decision of the House of Lords in Shaw v. D.P.P. Stephens in the nineteenth century concluded that in a society which is marked by a considerable degree of moral solidarity, legal means should be used to enforce morality as such. The law should be²³ 'A persecution of the grosser forms of vice', whether or not these involved harm for others. Lord Devlin in his new celebrated Maccabean Lecture The Enforcement of Morals delivered before the British Academy in 1959 apparently considered that the breach of a moral principle, albeit in private, was an offence against and endangered society as a whole. Consequently society should use the law to safeguard its own existence²⁴ 'But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation. The law must protect also the community of ideas, political and moral, without which people cannot live together. Society cannot ignore the morality of the individual any more than it can his loyalty'. These words applied to private acts of adults are very sweeping. The recent high water mark of judicial intervention into the moral field, is however, to be found in the speeches delivered in the House of

23. Liberty Equality Fraternity p. 162

24. Proceedings of the British Academy (1959) p. 149

Lords in the Ladies' Directory Case.²⁵

The essential facts in that case were that the accused had composed and had published a Directory containing the names and addresses of prostitutes the nude photographs of some of them, and a code indicating certain services which they made available. The prosecution was founded on three counts, of which the third alone is of importance in the present discussion, namely, 'Conspiring to corrupt public morals by means of the Ladies Directory': all the judges, with the exception of Lord Reid, supported the conviction on this ground. Lord Simonds observed ²⁶ 'When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the custos morum of the people, he was asserting as I now assert that there is in that court a residual power where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare.' If this view is to be pressed to its logical extreme, the courts in England will have assumed the full powers of a puritan theocracy, punishing infringements of a moral code which, however venerated by senior judges, in fact no longer represents the standards of their grandchildren. Morality in Western society as in any society is not static but emergent, nor is it likely that fear of legal sanctions will check the evolution of new patterns. At present it seems probable that in sexual and other matters there may be a number of mutually tolerant moralities, and that, in the views of many, the deprivation of liberty of action and the condemnation of sincerely held deviations from traditional patterns may itself infringe basic principles of morality.

25. Shaw v. D.P.P. sup. cit. See also A.L. Goodhart 'The Shaw Case: The Law and Public Morals' (1961) 77 LQR 560. In this article the author also discusses R. v. Quinn (1961) 3 WLR 611 in which the proprietor of a private club was held guilty of keeping a 'disorderly house' by giving 'indecent' performances at p. 268

It is impossible, for example, to scrutinise in detail the interrelation of legal, religious, and social considerations in determining the divorce laws of Britain at the present time. Professor O.R. McGregor in his paper²⁷ 'The Morton Commission: A Commentary' has criticised sharply and in detail the Report of the Royal Commission on Marriage and Divorce. The judge who presided and the majority of the Commission, as McGregor stresses, disregarded alike the inconsistencies of their attitude to the 'matrimonial offence' and the possible assistance which they could have derived from sociological research. Sociological evidence was little stressed or indeed given. In England²⁸ 'The obsession of mediaeval Christianity with the sinfulness of sex persisted through later centuries and determined the character of the civil law of divorce'. This obsession is reflected still in the Morton Report. The influence of the Church of England, which claims the allegiance of a minority of the population, seems to be particularly strong in those legal circles which administer the English laws of divorce. Professor McGregor described the evidence to the Commission of Mr. J.E.S. Simon, Q.C. a leading divorce practitioner, as commanding²⁹ 'the respect that would be accorded to the views of a teetotal publican on the evils of drink'. Nevertheless, Sir Jocelyn is now President of the Probate Divorce and Admiralty Division of the High Court of Justice. Though McGregor did not discuss, except incidentally, the attitude of Scottish judges to divorce, he recognised the more commonsense attitude of Lord Keith and might have added that another Scottish advocate, the present Lord Walker, in his Note of Dissent advocated a complete rejection of the doctrine of matrimonial offence. Nevertheless divorce law reform for Scotland seemingly can only move at the rate

27. (1956) 7 Brit. J. of Soc. 171

28. *ibid.* 184

29. *ibid.* note 56.

permitted by the Anglican establishment in London which is powerful both in administering and conserving English Divorce Law.

In conclusion it is perhaps the wiser course to say that the law in England has so far been stretched much further than that of Scotland to regulate private morality. Nevertheless in Scotland there is a tendency to give wide interpretation to offences where sexual morality is involved. Moreover, though the phenomenon is not novel, judges in Scotland may be somewhat prone to pass moral judgments in situations where a decision in law is all that their duty requires. There has, for example, been some criticism of Lord Wheatley's lengthy judgment in the Argyll divorce.³⁰ Some of this criticism is not justified, since His Lordship had to enter into reasons for believing or disbelieving witnesses³¹ and for concluding that persons had in fact availed themselves of opportunities for adultery. To that extent some plain speaking was unavoidable. Nevertheless one who is not a lawyer might conclude that Lord Wheatley's comments on certain persons involved were to some extent 'giving them their characters' and that to appear before the Court of Session today is to risk some of the kind of censure which the sinner suffered when haled before the Kirk Sessions in former days. Lawyers in Britain emulate at times not only the role of the priest of justice but also that of the Old Testament prophet. In the course of an after luncheon speech to the National Union of Journalists Lord Wheatley gave his views on the position of a judge in society. He is reported as follows³² 'If people do embarrassing things which bring them into court, then they cannot complain if they are embarrassed, because the court is there to ascertain the truth and the truth may be embarrassing... A judge does not court publicity but by the very nature of his job he is likely to attract it. He will exercise discretion whenever it is possible but sometimes it is impossible

30. 'Scotsman' May 15th, 1963

31. Some cross examination ostensibly directed as to credibility was given wider scope than a laywoman would consider necessary to test truth.

32. 'Sunday Mail' April 5th, 1964.

to avoid the embarrassment to which I have referred.' Lord Wheatley observed that by the Judicial Proceedings (Regulations of Reports) Act 1926, the press are prevented from reproducing the evidence given in certain civil cases, but they may reproduce and print the judgments. He continued 'in my view the reproduction of salacious evidence is neither necessary nor desirable in the public interest. I would extend the provisions of the Act even further... I regard it as quite anomalous that the Act should veto the reproduction of the evidence and allow the judgment to be reproduced by the newspapers, because, as I have explained, the judgment has to contain a rehearsal of the evidence, an appraisal of the witnesses, and has to deal with the character of witnesses ... I would cancel out the contradiction by vetoing the judgment also in the appropriate case.'

Lord Devlin's theme in his Maccabean Lecture was concerned with the question of when law should reinforce morality. Professor A.H. Campbell, of the Law Faculty of Edinburgh University, is to deliver a lecture in the same series in 1965. It is anticipated that he will discuss in the course of his paper 'Obligation and Obedience to Law' moral reasons for refusing to observe the law. The classical example was appropriately of a woman. Antigone's dilemma was one that often occurs in a society of any complexity. She believed in the norms, the customary laws of her people regarding burial of the dead, and was prepared to die to support her moral duty to bury her brother. Creon knew another law, one of political necessity, and was prepared that Antigone should die rather than that the authority he represented should be overthrown. Perhaps every society known to us in history has held these paradoxical ideas of what is 'lawful'. It seems clear that at any given time two or more widely believed

and supported views of right behaviour may exist. Our own society is no different in this respect and our lawyers, like those in Western society in general, are not philosophers. They are rather the Greens of our time, trained in a system that integrates the ideas of law and morality within a strictly institutionalised framework. Gibbon, reflecting on Roman society which has so profoundly influenced all Western ideas of law, might have a last word: 'The various modes of worship, which prevailed in the Roman World, were all considered by the people as equally true; by the philosopher as equally false; and by the magistrate as equally useful.' It seems probable that the magistracy and the lawyers will always have to conserve what they see to be the popular mores and to deny either philosophy or avant garde behaviour.

BIBLIOGRAPHY

- Acts of the Parliaments of Scotland, 1124-1707; ed. Thomson T. and Innes G. Edinburgh 1875.
- Acts of Sederunt of the Court of Session 1628-1740; Edinburgh 1740-62.
- Allen, Layman E. 'Automation: Substitute and Supplement in Legal Practice'; (1963) 7 Am. Behav. Sc.39.
- Anon. 'On choosing a Wife'; 1949 S.L.T. (News) 153.
- Anon. The Office of a Notary Public; Edinburgh 1792.
- Anton, A.E. 'Scottish Thoughts on French Civil Procedure'; 1956 Jur. Rev. 158.
- Aristotle. Politics; Ed. Jowett; Oxford 1938.
- Aron, Raymond. 'Social Structure and The Ruling Class'; (1950) Brit. J. Soc.
- Aubert, Vilhelm. 'Researches in the Sociology of Law'; (1963) 7 Am. Behav. Sc.16.
- Bales, Robert F. 'A Set of Categories for the Analysis of Small Group Interaction'; (1950) pp. 257-263. Amer.Soc.Rev.
- Bankton (Lord). Institute of the Laws of Scotland; 1751-3.
- Banton, Michael. 'Work paper for Wenner-Gren Conference'; (1964), unpublished.
- Banton, Michael. The Policeman in the Community; London 1964.
- Banton, Michael. 'Anthropological Perspectives in Sociology'; (1964) Vol.XV. No.2 Brit.J.Soc.
- Beattie, John. Other Cultures; London 1964.
- Becker, Howard and Carter. 'The Development of Identification with an Occupation'; (1956) Vol.LXI; Amer.J.Soc.
- Becker, Theodore L. 'On Science, Political Science and Law'; (1963) 7 Am. Behav. Sc. 11.
- Bell's Dictionary and Digest of the Law of Scotland; ed. G. Watson; Edinburgh 1890.
- Benedict, Ruth. Patterns of Culture; London 1935.
- Berman, Harold J. Talks on American Law; (paperback) New York 1961.
- Bierstedt, Robert. 'Sociology and Humane Learning'. (1960) 25 Am.Soc.Rev. 3.

- Blau, Peter M. 'Co-operation and Competition in a Bureaucracy'; (1954) 59 Am.J.Soc. 530.
- Blau, Peter M. 'A Theory of Social Integration'; (1960) Vol.LXV; May. Amer. J.Soc.
- Blaustein, A.P. and Porter, C.O. The American Lawyer: A Summary of the Legal Profession. New York 1954.
- Blom-Cooper, Louis. 'Prostitution: A Socio-Legal Comment on the Case of Dr Ward'; (1964) Vol.XVI; Brit.J.Soc.
- Boswell, J. ed. Pottle, F.A. Boswell in Holland; London 1952.
- Boswell, J. ed. Ryskamp and Pottle. Boswell: The Ominous Years; New York, London, 1963.
- Boswell, J. ed. Wimsatt and Pottle. Boswell for the Defence; New York, London, 1959.
- Bott, Elizabeth. Family and Social Network; London 1957.
- Boulton, W.W. Conduct and Etiquette at the Bar; London 1957.
- Brissaud, J. History of French Private Law; London 1912.
- Brockenbury. Patient and Doctor; London 1935.
- Brown, J.C. Origin and Early History of Notary; Edinburgh 1936.
- Brown, Ralph S., Jr. 'Legal Research: The Resource Base and Traditional Approaches'; (1963) 7 Am.Behav.Sc. 3.
- Buchan, John. Andrew Jameson Lord Ardwall; Edinburgh 1913.
- Bucher, Rue and Strauss, Anselm. 'Professions in Process'; (1961) pp.325-334; Amer.J.Soc.
- Burns, Tom. 'The Reference of Conduct in Small Groups: Cliques and Cabals in Occupational Milieux'; (1955) 8 Human Relations 467.
- Caplow, Theodore. Sociology of Work; (University of Minnesota Press 1954).
- Carr-Saunders, A.M. and Wilson, P.A. The Professions; (Oxford 1933).
- Cases and Materials for Introduction to the Study of Law; Cornell 1953
- Cardozo, B.N. Nature of the Judicial Process; New Haven 1952.
- Cardozo, B.N. The Paradoxes of Legal Science; New York, 1928.

- Cardozo, B.N. The Growth of the Law; New Haven 1946.
- Cavers, David F. 'Legal Education in the United States'; Harvard pamphlet No.1
Cambridge, Mass. 1960.
- Cecil, H. (Leon) Sober as a Judge; London 1958.
- Cecil, H. (Leon) Ways and Means; London 1958.
- Cecil, H. (Leon) Not Such an Ass; London 1959.
- Cecil, H. (Leon) Tipping the Scales; London 1964.
- Cheatham, E.E. The Legal Profession; 2nd Ed. 1955 Brooklyn.
- Cockburn, H. Memorials of His Time; Edinburgh 1866.
- Cockburn, H. Journal; Vols I and II; Edinburgh 1874.
- Cockburn, H. Life of Lord Jeffrey; Edinburgh 1852.
- Cockshutt, H.J.B. The Services of a Solicitor; London 1961.
- Cohn, E.J. 'The German Attorney - Experiences with a Unified Profession';
(1960) 9 I.C.L.Q. 580; (1961) 10 I.C.L.Q. 103.
- Cooper (Lord) Selected Papers 1922-1954; Edinburgh 1957.
- Corpus Juris Civilis; Ed. Mommsen Krueger; Berlin 1954.
- Crémieu, L. Traité de la Profession d'Avocat; Paris; 2nd ed. 1954.
- Daiches, David. The Paradox of Scottish Culture; The 18th Century Experience;
London 1964.
- Dalton, Melville. 'Informal Factors in Career Achievement'; (1951) 56 Am.J.Soc.
407.
- Dart, H. Planché. The History of the Supreme Court of Louisiana; in 133 La.
Rep. p XXX.
- David, R. and de Vries, H. The French Legal System; New York 1958.
- Davie, G.E. The Democratic Intellect. Scotland and her Universities in the
19th Century; Edinburgh 1961.
- Dawson, J.P. A History of Professional Judges; author's M/S awaiting publication.
- de Grazia, Alfred and Ruttenberg, Charles L. 'Innovators in the Study of the
Legal Process'; (1963) 7 Am.Behav.Sc. 48.

- Denning (Lord). 'The Need for a New Equity'; (1952) 5 Current Legal Problems 1.
- Devlin (Lord). 'The Enforcement of Morals'; (1959) Proceedings of the British Academy 149.
- Döhring, E. Geschichte der Deutschen Rechtspflege seit 1509; Berlin 1953.
- Drinker, H.S. Legal Ethics; New York, 1953.
- Den Cann, Richard. The Art of the Advocate; (Pelican); London 1964.
- Durkheim, Emile. The Division of Labour in Society; (Paperback); New York 1964.
- Durkheim, Emile. The Rules of Sociological Method; (Paperback); New York 1964.
- Durkheim, Emile. Suicide; London 1952.
- Durkheim, Emile. The Elementary Forms of the Religious Life; (Paperback); New York 1961.
- Durkheim, Emile. Professional Ethics and Civic Morals; London 1957.
- Elliott, W.A. 'Nulla Poena Sine Lege'; 1956 Jur.Rev. 22.
- Erskine, J. Institute of the Law of Scotland; Edinburgh new ed. 1824-8.
- Essays on the Ritual of Social Relations; Ed. Gluckman; Manchester 1962.
- Foreign Resident. Society in London; London 1885.
- Farrer-Brown, Leslie. 'Professionalism in the Health Service'; (1953) April; Lancet.
- Field, M. 'Structured Strain in the role of the Soviet Physician'; (1958) pp. 493-502; Amer.J.Soc.
- Fountainhall, J.L. Historical Notices of Scottish Affairs; Edinburgh 1848.
- Frank, Jerome. Law and the Modern Mind; London 1949.
- Gennep, Arnold van. The Rites of Passage; London 1960.
- Gibb, A.D. Judicial Corruption in the United Kingdom; Edinburgh 1957.
- Gibb, A.D. Law from over the Border; Edinburgh 1950.
- Ginsberg. Studies in Sociology; London 1959.
- Gluckman, Max. Custom and Conflict in Africa; London 1959.

- Gluckman, Max. The Judicial Process Among the Barotse of Northern Rhodesia; Manchester 1955.
- Goffman, Erving. 'The Nature of Deference and Demeanour'; (1956) pp.473-502; Amer. Anth.
- Goffman, Erving. The Presentation of Self in Every-day Life; (Paperback) New York 1959.
- Goldschmidt, Walter. Understanding Human Society; London 1959.
- Goode, William J. 'Community Within a Community: the Professions'; (1957); 22 Am.Soc.Rev. 194.
- Gouldner. Patterns of Industrial Bureaucracy; London 1955.
- Gouldner, A.W. and Gouldener, Helen. Modern Sociology; New York 1963.
- Grainger Stewart, A.A. Portraits in the Hall of the Parliament House; Edinburgh 1907.
- Grazia, Alfred de. See: de Grazia, Alfred.
- Green's Legal Diary; Edinburgh 1964.
- Griswold, E.N. Law and Lawyers in the United States; London 1964.
- Haberman, Philip W. 'An Interview with Bethual M. Webster'; (1963) Vol.18.ii; The Record of the Association of the Bar of the City of New York.
- Hall, Oswald. 'The Informal Organisation of the Medical Profession'; (1946); 12 Can.J.Econ. and Pol.Sc. 30.
- Hanham, H.J. 'The Scottish Political Tradition'; Inaugural Lecture Edinburgh 1964.
- Hannay, R.K. The College of Justice; Edinburgh 1933.
- Hargreaves-Mawdsley. A History of Legal Dress in Europe; Oxford 1963.
- Harvard Law School. 'Committee on Legal Education Report to the Faculty'; Cambridge, Mass. 1960.
- Harvard Law Review. Introduction to Law. Selected Essays; Cambridge, Mass. 1962.
- Harvey, C.P. The Advocate's Devil; London 1958.
- Heiton, John. The Castes of Edinburgh; Edinburgh 1861.
- Hoebel, E. Adamson. The Law of Primitive Man; Harvard 1954.

- Holmes, O.W. The Common Law; Boston, 41 Ed. 1948
- Homans, George C. The Human Group; London 1951.
- Homans, George C. Social Behaviour: Its Elementary Forms; New York 1961.
- Homans, George C. Sentiments and Activities; London 1962.
- Hughes, Everett C. 'Institutional Office and the Person'; (1937); 43 Am.J.Soc. non.
- Hughes, Everett C. 'Dilemmas and Contradictions of Status'; (1945); pp. 353-359; Amer.J.Soc.
- Hughes, Everett C. 'Social Change and Status Protest: an Essay on the Marginal Man'; (1949); 10 Phylon 58.
- Hughes, Everett C. Men and their Work; Illinois 1958.
- Hume, D. Commentaries on the Law of Scotland Respecting Crimes; Edinburgh 1829.
- Innes, C. Scotch Legal Antiquities; Edinburgh 1872.
- Introduction to Scottish Legal History; Stair Soc. Vol.20; Edinburgh 1958.
- Jenks, E. A Short History of English Law; London; 6th Ed. 1949.
- Kadushin, Charles. 'Social Distance between Client and Professional'; (1962); LXVII. 5. Amer.J.Soc.
- Kelsall, R.K. 'Self Recruitment in four professions'; / in Social Mobility in Britain, Ed. D.V. Glass; London 1954.
- Kennedy, N.S.D. 'The 2nd Division's Progress'; (1896); 8 Jur.Rev. 268.
- Kuh, Richard H. 'Careers in Prosecution Offices'; (1961); Vol.14, 2; Journal of Legal Education.
- Landis, B.Y. Professional Codes: A Sociological Analysis; London 1927.
- Lehmann, W.C. John Millar of Glasgow; (1960) Cambridge.
- Lepaulle, P.G. 'Law Practice in France'; (1950) 5 Colum L.R. 945.
- Lewis, R. and Maude, A. Professional People; London 1952.
- Linton, Ralph. The Study of Man; New York 1936.
- Littlejohn, James. Westrigg. The Sociology of a Cheviot Parish; London 1963.

- Llewellyn, Karl and Hoebel, E. Adamson. The Cheyenne Way; Oklahoma 1941.
- Lorimer, J. Studies National and International; Edinburgh 1890.
- Lynd, Robt. S. and Helen M. Middletown; Harcourt, Brace and Co. 1929.
- Lucas, Paul. 'Blackstone & The Education of the Legal Profession'; (1962); Eng. Hist. Rev. 1962.
- McGregor, O. R. 'The Morton Commission: A Commentary'; (1956); 7 Brit. J. of Soc. 171.
- Mackay, A. J. G. Practice of the Court of Session; Edinburgh 1877-9.
- Maclaren, J. A. Court of Session Practice; Edinburgh 1916.
- Maine, H. J. S. Ancient Law; New Ed. by Pollock 1930.
- Maitland, F. W. Domesday Book and Beyond; Cambridge 1897.
- Malinowski, Bronislaw. Crime and Custom in Savage Society; London 1926.
- Marshall, T. H. Citizenship and Social Class; Cambridge 1950.
- Marshall, T. H. Sociology at the Crossroads; London 1963.
- Marx, Karl and Engels Friedrich. Manifesto of the Communist Party; London 1888.
- Marx, Karl. Value, Price and Profit; London 1899.
- Marx, Karl. 'Capital'; Vols. I-III; London 1928.
- Mauss, Marcel. The Gift; London 1954.
- Mayhew. London Life and the London Poor; IV Vols; 1861.
- Megarry, R. E. Lawyer and Litigant in England; London 1962.
- Merton, Robert K. 'The Role-Set: Problems in Sociological Theory'; (1957); 8 Brit. J. Soc. 106.
- Mills, C. Wright. White Collar: The American Middle Classes; New York 1951.
- Mitchell, J. D. B. 'Changes in the Law Faculty - A Traditional Revolution'; (1961) Vol. XX. 2. Univ. of Edin. Journal.
- Molierac, J. Initiation au Barreau; Paris 1947.
- Murdock, G. P. Social Structure; New York 1949.

- Nadel, S.F. The Theory of Social Structure; Cambridge 1957.
- Nagel, Stuart S. 'A Conceptual Scheme of the Judicial Process'; (1963);
7 Am.Behav.Sc. 7.
- Olivier-Martin, F. Précis d'Histoire du Droit Français; Paris 1951.
- Omond, G.W.T. Lord Advocates of Scotland; Edinburgh 1883 and 1914.
- Ossowski, Stanislaw. Class Structure in the Social Consciousness; London 1963.
- Parsons, Talcott. 'The Professions and Social Structure'; (1939); 17 Social Forces 457.
- Parsons, Talcott. 'The Theoretical Development of the Sociology of Religion: a chapter in the History of Modern Social Science'; (1944); 5 J. History of Ideas 176.
- Parsons, Talcott. Essays in Sociological Theory; New York 1954.
- Paton, G.W. A Text Book of Jurisprudence; London 1946.
- Philip, James Randall. 'The Art and Ethics of Advocacy'; Edinburgh 1946.
- Philip, James Randall. 'The Use of English in the Law Courts'; Edinburgh 1948.
- Philip, James Randall. 'Lord Cockburn: A Portrait Gallery of Augustan Edinburgh'; Edinburgh 1955.
- Philipson, N. 'History of the Faculty of Advocates 1707-1850'; Unpublished doctorate M/S.
- Pollock, F. Essays in the Law; London 1922.
- Popper, Karl R. The Poverty of Historicism; London 1957.
- Porguard M. 'Etudes de droit, stage, profession, d'Avocat'; (1948); 8 Rev. du Barreau 113.
- Pound, Roscoe. The Lawyer from Antiquity to Modern Times; Cambridge, Mass. 1953.
- Pound, Roscoe. An Introduction to the Philosophy of Law; (Paperback); Yale 1954.
- Radcliffe-Brown, A.R. Structure and Function in Primitive Society; London 1952.
- Riesman, David. 'Toward an Anthropological Science of Law and the Legal Profession'; (1951) 57 Am.J.Soc. 121.

- Riesman, David. Individualism Reconsidered and Other Essays; (Paperback); New York 1964.
- Reisman, L. 'A Study of Role Conceptions in Bureaucracy'; (1949); Mar.Soc. Forces.
- Roethlisberger F.J. and Dickson W.J. Management and The Worker (at Hawthorns plant of the West Elec. Co.); Harvard 1950.
- Sartre, Jean Paul. The Problem of Method; Translated, Hazel E. Barnes; London 1963.
- Scammel, E.H. 'The Common Market and the Legal Profession'; (1963); 16 Current Legal Problems 54.
- Schlesinger, R.B. Comparative Law; London, 2nd Ed. 1960.
- Schwartz. History of Roman Legal Science; Oxford 1946.
- Schwartz, Murray L. Cases and Materials on Professional Responsibility and The Administration of Criminal Justice; Chicago 1961.
- Schweinburg, Eric F. Law Training in Continental Europe; Russell Sage Foundation 1945.
- Scots Law Times. 'Judicial Titles in Scotland' (P.G.B.McN.); (1964); July S.L.T. (News) 125.
- Scott, Ronald Bodley. 'The Doctor in Contemporary Literature'; (1955); Lancet, 13th August.
- Scott, Sir Walter. Redgauntlet; Edinburgh 1901. (Nelson Ed.)
- The Sesquicentennial of the Supreme Court of Louisiana; St. Paul 1964.
- Shand, C.F. Practice of the Court of Session; Edinburgh 1848.
- Shortel, R. and Wolff, H.J. 'German Lawyers - Training and Functions'; (1943) 42 Mich.L.R. 521.
- Simmel, Georg. Conflict and the Web of Group Affiliations; (Paperback); New York 1964.
- Smigel, Erwin O. 'Interviewing a Legal Elite: The Wall Street Lawyer'; (1958) Vol.LXIV, 2. Amer.J.Soc.
- Smith, Adam. Wealth of Nations; London 1930.
- Smith, Madeleine, Trial of; Ed. A. Duncan Smith; Edinburgh 1905.
- Smith, T.B. British Justice: The Scottish Contribution; London 1961.

- Smith, T.B. Short Commentary on the Law of Scotland; Edinburgh 1962.
- Smith, T.B. Studies Critical and Comparative; Edinburgh 1962.
- Smith, T.B. 'Legal Imperialism and Legal Parochialism'; 1965; Jur.Rev. (galley proofs).
- Society and The Law; (Ed. Davis, Foster, Jeffrey and Davis); New York 1961.
- Spencer, Herbert. The Principles of Sociology; London 1877.
- Stein, P. 'The College of Judges at Pavia'; (1952); 64 Jur.Rev. 204.
- Stein, P. 'Legal Thought in Eighteenth Century Scotland'; 1957; Jur.Rev. 1.
- Steiner, Franz. Taboo; London 1956.
- Stephen, J. Fitz.J. A History of the Criminal Law of England; London 1883.
- Stone, H.F. 'The Public Influence of the Bar'; (1934); 48; Harv.L.R. 1.
- Sutherland, A.E. A New Society and an Old Calling; (1938); Cornell L.Q. Vol 34.
- Sutherland, A.E. La Formation du Juriste Américaine; Grenoble, Author's text of address, 7th December 1956.
- Tawney, R.H. Religion and the Rise of Capitalism; (Pelican); London 1938.
- Topham, Captain. Edinburgh Life 100 Years Ago (Selections); Edinburgh 1886.
- Tropp, Asher. 'The Changing Status of the Teacher in England and Wales'; (1953) Yearbook of Education.
- Tropp, Asher. The Schoolteachers; London 1957.
- Trumbull, William M. Materials on The Lawyer's Professional Responsibility; Boston 1957.
- Ulmer, S. Sidney. 'Scientific Method and the Judicial Process'; (1963); 7 Am.Behav.Sc. 21.
- Veblen Thorstein. The Theory of the Leisure Classes; Mentor Books; 1953.
- Veblen Thorstein. The Theory of Business Enterprise; Mentor Books; 1958.

- Walker (Lord) J. 'The Growth of the Criminal Law'; (1958); Jur.Rev. 230.
- Wardwell, W.I. 'Social integration, bureaucratisation and The Professions'; (1955); May; Social Forces.
- Wardwell, W.I. and Wood, A.L. 'The Extra-Professional Role of the Lawyer'; (1956); Vol.LXI. 4; Amer.J.Soc.
- Warner W. Lloyd, Havighurst and Lock. 'Who Shall be Educated?'; New York 1944.
- Warner W. Lloyd with Meeker and Eells. 'Social Class in America. The Evaluation of Status; (Paperback); New York 1960.
- Williams, Glanville. 'Learning the Law; London 1957.
- Willmott, Peter and Young, Michael, 'Family and Class in a London Suburb; London 1960.
- Wilson, John Gray. 'The Trial of Peter Manuel; London 1959.
- Wilson, Logan. 'The Academic Man. A Study in the Sociology of^a Profession; Oxford 1942.
- Winick, Charles. 'A Primer of Psychological Theories Holding Implications for Legal Work'; (1963); 7 Am.Behav.Sc. 45.
- Weber, Max. 'The Protestant Ethic and the Spirit of Capitalism; (trans. Talcott Parsons); (Paperback); New York 1958.
- Weber, Max. 'The Theory of Social and Economic Organisation; trans. Henderson and Talcott Parsons; New York 1947.
- Weber, Max. 'From Max Weber: Essays in Sociology; trans and Ed. H.H. Gerth and C. Wright Mills; London 1948.
- Whyte, W.F. 'Human Relations in the Restaurant Industry; New York 1948.
- Whyte, W.F. 'Street Corner Society; Chicago 1943.
- Williams, J.J. 'Patients and Prejudice: lay attitudes towards Women Physicians'; (1946); Vol 51 (Jan) Amer.J.Soc.
- Winters. 'Bar Association Organisation and Activities; New York 1954.
- Young, Michael and Willmott, Peter. 'Family and Kinship in East London; London 1957.